78-1164

Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

October Term, 1978

NO. A-426

BOBBY WADE HOLLAND,

Petitioner,

vs.

SEABOARD COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

PODHURST, ORSECK & PARKS, P.A.
25 West Flagler Street
Miami, Florida

SUSAN GOLDMAN, ESQUIRE
PH 1, Roberts Building
28 West Flagler Street
Miami, Florida 33130

HASTINGS AND GOLDMAN
300 71st Street, Suite 530
Miami Beach, Florida 33140

Of Counsel

WALTER H. BECKHAM, JR., ESQUIRE
JOEL D. EATON, ESQUIRE
25 West Flagler Street
Miami, Florida 33130
Tel: (305) 358-2800

LAWRENCE V. HASTINGS, ESQUIRE
300 71st Street, Suite 530
Miami Beach, Florida 33140

Counsel for Petitioner

61

INDEX

Page

Opinion below 2

Jurisdiction 2

Questions presented 3

Statutes and constitutional provisions involved 4

Statement of the case 5

Reasons for granting the writ 12

1. The decision below defeats a federal right of recovery under the Federal Employers' Liability Act by application of restrictive local pleading rules; conflicting with decisions of this Court and other courts of appeals as to liberal federal notice pleading 12

   a. The decision below conflicts with decisions of this Court holding that federal substantive rights may not be infringed under local practice — specifically holding that local pleading requirements may not infringe federally created rights 19

INDEX (Continued)

Page

2. The decision below severely undermines the force and effect of the Federal Employers' Liability Act by holding that an erroneous exclusion of one of the plaintiff's theories of negligence is harmless error, raising significant problems insofar as assuring a correct and uniform application of the FELA in State and Federal courts. 22

3. The exclusion of proof of a viable theory of liability in an action arising under the Federal Employers' Liability Act, because of local pleading rules, constitutes deprivation of right to a jury trial under the Seventh Amendment to the Constitution of the United States 26

4. The decision below conflicts with decisions of this Court and courts of appeals as to the inclusion of a jury charge on legal cause utilizing the "but for" test of proximate cause, in a case under the Federal Employers' Liability Act. 28

Conclusion 31

Appendix 33

CITATIONS

Cases: **Page**

Arnold v. Panhandle & S.F.R. Co.,
353 U.S. 360, 77 S.Ct. 840, (1957) 20

Bailey v. Central Vermont Ry.,
319 U.S. 350, 63 S.Ct. 1062 (1943) 14

Boston & M.R.R. v. Meech,
156 F.2d 109 (1st Cir. 1946), cert. den. 329 U.S. 763 (1946). 25

Brown v. Western Railways of Alabama,
338 U.S. 294, 70 S.Ct. 105 (1949) 19

Conley v. Gibson,
355 U.S. 41, 47-48, 78 S.Ct. 99, 103 (1957) 13

Dice v. Akron, C. & Y.R. Co.,
342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952) 20

Eggert v. Norfolk & W.Ry. Co.,
538 F.2d 509 (2d Cir. 1976) 24

Eglsaer v. Scandrett,
151 F.2d 562 (7th Cir. 1945) 30

Gallick v. Baltimore and Ohio Railroad Company,
327 U.S. 108, 116, 83 S.Ct. 659, 664 (1963) 30

Harris v. Pennsylvania R.Co.,
361 U.S. 15, 80 S.Ct. 22 (1959) 30

CITATIONS (Continued)

Cases: **Page**

Komer v. Shipley,
154 F.2d 861 (5th Cir. 1946) 13

Mooney v. Denver & R.G.W.R. Co.,
257 P.2d 947 (Utah 1953) 17

Pehowic v. Erie Lackawanna Railroad Company,
430 F.2d 697, 700 (3d Cir. 1970) 30

Rodriquez v. Delray Connecting Rd.,
473 F.2d 819 (6th Cir. 1973) 25

Rogers v. Missouri Pacific Railroad Co.,
352 U.S. 500, 77 S.Ct. 442 (1957) 23

Seaboard Airline Railroad Co. v. Strickland,
80 So.2d 914 (Fla. 1955) 15

Stone v. New York, C. & St.L.R. Co.,
344 U.S. 407 73 S.Ct. 358 (1953)..... 25

Strickland v. Seaboard Airline Railroad Co.,
350 U.S. 893, 76 S.Ct. 157, (1955) 15

Urie v. Thompson,
337 U.S. 163, 69 S.Ct. 1018 (1949) 20

in the

Supreme Court

of the

United States

OCTOBER TERM, 1978

NO. A-426

BOBBY WADE HOLLAND,
Petitioner

vs.

SEABOARD COAST LINE
RAILROAD COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

The Petitioner, BOBBY WADE HOLLAND, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the District Court of Appeal of Florida, First District, entered in this proceeding on December 20, 1977.

OPINION BELOW

The Opinion of the District Court of Appeal at 353 So.2d 618 (Fla. 1st DCA 1978) appears in the Appendix hereto. (A. 1-7) A timely Petition for Rehearing was denied without opinion by the District Court of Appeal of Florida, First District, on January 12, 1978. Petition for Writ of Certiorari was denied by the Supreme Court of Florida on May 17, 1978; a timely Petition for Rehearing was denied without opinion by the Supreme Court of Florida on August 28, 1978.

JURISDICTION

The Opinion of the District Court of Appeal of Florida, First District, was entered on December 20, 1977 and a timely Petition for Rehearing was denied on January 12, 1978. Petition for Writ of Certiorari to the Supreme Court of Florida was denied on May 17, 1978; Petition for Rehearing was denied by the Supreme Court of Florida on August 28, 1978. This Court entered its Order on November 6, 1978 extending time to file the Petition for Writ of Certiorari to and including January 26, 1979. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether a Federal right of recovery under the Federal Employers' Liability Act may be defeated by local State rules of pleading and practice that are in conflict with Federal notice pleading.

2. Whether a local harmless error statute may be applied in an action under the Federal Employers' Liability Act so as to render harmless the erroneous exclusion of a viable theory of liability from consideration by the jury.

3. Whether the exclusion of proof of a viable theory of liability in an action arising under the Federal Employers' Liability Act constitutes deprivation of right to a jury trial under the Seventh Amendment to the Constitution of the United States.

4. Whether in an action under the Federal Employers' Liability Act a jury charge on legal causation utilizing the "but for" test of proximate cause is erroneous and constitutes reversible prejudicial error.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Seventh Amendment to the Constitution of the United States of America providing in relevant part:

> In Suits in common law . . . the right of trial by jury shall be preserved . . . .

2. Federal Employers' Liability Act, 45 U.S.C.A., Section 51, providing in part:

> Every . . . railroad . . . shall be liable in damages . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track . . . or other equipment.

3. Florida Statute, Section 59.041 (1975):

> No judgment shall be set aside or reversed, or new trial granted by any Court of the State in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the Court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This Section shall be liberally construed.

STATEMENT OF THE CASE

1. Proceedings Below

The Petitioner was the Plaintiff in Duval County Circuit Court, in a personal injury action instituted pursuant to the Federal Employers Liability Act, and the Federal Safety Appliance Act. The plaintiff was a brakeman, who lost both legs in a switching movement when he fell from a rear car on the train as it was backing up to be coupled onto the remainder of the train cars. The wheels passed over his legs, resulting in amputation.

The incident occurred on the night of October 17, 1973 in Tifton, Georgia. The Petitioner alleged various acts of negligence on the part of the railroad under the Federal Employers Liability Act, and claimed various violations of the Safety Appliance Act. (A. 7-13). A jury verdict for the defendant railroad was returned and final judgment was entered. The motion of the plaintiff/Petitioner for a new trial was denied. (A. 13-19). The plaintiff appealed to the First District Court of Appeal and the judgment was affirmed. (A. 1-7) Plaintiff's Petition for a Writ of Certiorari was denied without opinion by the Supreme Court of Florida.

2. The Facts Shown at Trial

The Petitioner, BOBBY HOLLAND, was working as brakeman for the Respondent RAILROAD during a pre-dawn switching movement in Tifton, Georgia, on October 17, 1973. The train was headed in a southerly direction. The engine unit and the front thirteen cars uncoupled from the rest of the train and left the balance

of the train standing to the north of the sidetrack. Twenty-six cars were located on the sidetrack and were to be coupled onto the rear of the engine and thirteen cars. The entire unit would then back up and couple up with the balance of the train which had been left standing a considerable distance to the north.

The engine and thirteen cars proceeded south past the sidetrack and BOBBY HOLLAND got off the train, threw the switch, and the engine and thirteen cars backed up onto the sidetrack, coupling up with the twenty-six cars. The train then proceeded off the sidepass, onto the main track and northward, clearing the switch; and BOBBY HOLLAND threw the switch again so that the train (engine and thirty-nine cars) could proceed backward on the main track to couple up with the cars that had been left behind. Under the switching movement as performed, BOBBY HOLLAND was required to get onto a rear car to ride back to the standing cars far to the north, and would then walk the length of the train to the lead engine to board. While the train was proceeding backward, however, BOBBY HOLLAND fell from the car and the train rode over his legs, severing them.

BOBBY HOLLAND sued the railroad, ultimately alleging in his Complaint, as amended, that the accident was caused through RAILROAD negligence, in, among other things, utilizing unsafe equipment; improperly signaling HOLLAND as to the movement; utilizing defective radio equipment; utilizing defective brakes; proceeding backward and disregarding HOLLAND's signals; backing up in such a manner as to cause excessive slack; failing to property communicate with HOLLAND; "negligently failing to furnish the

plaintiff a reasonably safe place in which to work"; and "negligently instructing and/or directing the train crew to pick up cars on the pass track in a manner and method as was known by the defendant to be hazardous when there was a safer alternative method of accomplishing the same objective." (A. 7-13).

With regard to negligence in failing to furnish a reasonably safe place to work and in negligently directing the crew to pick up cars by a hazardous method, when there was a safer alternative method of accomplishing the same objective, BOBBY HOLLAND, during discovery, inquired into existence of a growth of weeds and accumulation of debris, adjacent to the main tracks, just south of the sidetrack and switch. (A. 20-29). BOBBY HOLLAND attempted to establish that the RAILROAD, in permitting the accumulations and weeds, prevented a safer alternative from being utilized; and that this was relevant to his claim of negligent failure to provide the plaintiff with a reasonably safe place to work, and in negligently instructing the hazardous method utilized when there was a safer alternative method of accomplishing the same objectives.

HOLLAND's counsel emphasized this theory during the pre-trial conference, on a discussion of HOLLAND's Motion to Produce certain matters which would demonstrate RAILROAD knowledge of the weeds and debris—and which in turn would reveal that the RAILROAD, through permitting the condition to exist to the south of the switch and sidetrack, precluded a safer alternative. Counsel advised that riding a car at night in a back-up movement was dangerous, and that if the weeds did not exist just to the south of the track, the safer method could have been utilized. (A. 20).

In short, had the weeds and debris not existed, BOBBY HOLLAND would never have had to have ridden on the back of a moving car as it backed up in the dark; he could simply have checked the coupling and walked through the area to the engine.[1]

Again, in opening statement at the trial, HOLLAND's counsel explained to the jury that a safer switching movement could have been utilized whereby BOBBY HOLLAND never would have had to ride backwards in the dark but for the accumulation of weeds and debris.

At the trial, the trial court excluded the evidence which would demonstrate existence of weeds and debris preventing the use of a safer alternative switching movement. (A. 28-35). The trial court held that this theory was an afterthought, not covered by the pleadings; was inconsistent with the pleadings; and that the weeds and debris existing south of the track was not a cause of the accident at all. The evidence was excluded and HOLLAND's Motion for New Trial was ultimately denied. (A. 13-19).

At the close of the evidence, the trial court instructed the jury improperly on legal cause in this FELA-Safety Appliance Act case, as follows:

[1]In the Appendix is a copy of the diagrams which were contained in the reply brief of Holland in the District Court of Appeal proceeding. The diagrams illustrated the move as it was made and the move as it could have been made but for the weeds and debris. The diagrams reflect Holland's theory as presented in the proffers that were rejected; as compared to the move as actually made, as the testimony reflects. (A. 36-41).

> Negligence is a legal cause of injury if it directly and in a natural and continuous sequence produces, or contributes to producing such injury so that it can reasonably be said that but for the negligence, the injury would not have occurred.

This charge was given over HOLLAND's objection.

BOBBY HOLLAND appealed to the District Court of Appeal, First District, urging that the trial court committed reversible error in rejecting the proffers which would have shown that the weeds precluded a safer method. The First District Court of Appeal held as follows with regard to the evidence on the weeds and debris:

a. The proffered evidence that the RAILROAD failed to remove high weeds and debris adjacent to the track and roadbed near the accident scene was not admissible under any pleaded theory of negligence, including allegations in HOLLAND's Amended Complaint that the RAILROAD failed to furnish a reasonably safe place in which to work and negligently directed the train crew to pick up cars by a hazardous method when there was a safer alternative method of accomplishing the same objective.

b. The proffered evidence was not admissible to prove that the RAILROAD failed to provide HOLLAND a reasonably safe place to work, because HOLLAND "did not traverse the area said to have been overgrown with weeds and strewn with debris."

c. The proffered evidence in support of HOLLAND's theory of liability — "that by permitting an accumulation of weeds and debris, the Railroad negligently foreclosed appellant's use of that area of the track which, if used, would have permitted a safer operation than the operation actually employed" — may well have been a potential theory of liability, "but in causative terms, it was a step away from the pleaded theory."

d. "The bare mention of that theory of potential liability in the pre-trial conference held a few days before trial . . . did not amend the Complaint so as to require expansion of the liability theories at trial."

e. Any error, in any event, was "harmless" in the context of the lengthy and complicated trial of numerous liability issues and numerous theories of liability, under Florida Statutes Sec. 59.041 (1975). There is no miscarriage of justice after examination of the entire record where the jury considered and rejected HOLLAND's proof that the particular method used to move the train at the time and place of his injury was unreasonably dangerous.

f. The charge on legal cause, incorporating as it did the "but for" test of proximate causation, was error in a FELA or Safety Appliance Act case but was not of "sufficient magnitude to require reversal, considering the charge as a whole;" the error was "harmless" because it was used only once during the charge. The jury was also charged on the appropriate FELA or Safety Appliance Act test — that is, causation would be established if the alleged improper act on the part of the RAILROAD "contributed in whole or in part" to HOLLAND's injury.

g. The First District further held that the prejudicial effect of the erroneous portion of the offending instruction was obliterated by a following paragraph stating that under FELA, the RAILROAD was responsible if it were negligent and the negligence played any part, however small, in producing the injury for which damages are sought.[2]

3. How Federal Question is Presented

This action was brought under the Federal Employers' Liability Act and Safety Appliance Act. In Petitioner's Suggestion For Certification, filed in the District Court of Appeal of Florida, First District, seeking to certify the decision to the Supreme Court of Florida for certiorari review, upon the grounds that the decision passes upon questions of great public interest, Petitioner specifically stated:

* * * * *

> Whether exclusion of proof of a viable theory of liability, in an FELA case, because of local pleading rules, constitutes deprivation of right to a jury trial under the Seventh Amendment to the Constitution of the United States?

The District Court of Appeal of Florida, First District, denied Petitioner's Suggestion For Certification.

Throughout the proceedings, the Petitioner has asserted the applicable Federal FELA case law that had heretofore been applied uniformly throughout the country to protect Petitioner's substantive rights under the Federal Employers' Liability Act.

---

[2]The concurring Opinion found no error with the "but for" language of the charge, harmless or otherwise.

REASONS FOR GRANTING THE WRIT

1.

THE DECISION BELOW DEFEATS A FEDERAL RIGHT OF RECOVERY UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT BY APPLICATION OF RESTRICTIVE LOCAL PLEADING RULES, CONFLICTING WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO LIBERAL FEDERAL NOTICE PLEADING.

The decision below holds that a potential theory of liability under the FELA is properly excluded from consideration by the jury where "in causative terms it was a step away from the pleaded theories." Included among the allegations of negligence in this FELA action, BOBBY HOLLAND asserted that the RAILROAD was negligent in failing to furnish a "a reasonably safe place in which to work" and "in negligently directing the train crew to pick up cars by a hazardous method when there was a safer alternative method of accomplishing the same objective." The District Court of Appeal, First District of Florida, flatly held that the pleaded theory of negligence was insufficient to permit the introduction of evidence on the issue of the RAILROAD's negligent foreclosure of an area of the railroad track which, if used, would have permitted a safer operation than the operation actually employed; the proffered evidence simply being inadmissible under the pleadings.

This application of a stringent and restrictive pleading requirement in an FELA action, effectively defeating BOBBY HOLLAND's recognized theory of

liability, directly conflicts with the liberal notice pleading rule set forth by this Court in *Conley v. Gibson,* 355 U.S. 41, 47-48, 78 S.Ct. 99, 103 (1957). In considering the sufficiency of allegations in a complaint for declaratory relief, this Court announced:

* * * * *

> . . . . (T)he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. . . .

Accord, *Komer v. Shipley,* 154 F.2d 861 (5th Cir. 1946). Indeed, the record herein reflects that pre-trial discovery apprised the RAILROAD of HOLLAND's claim that the negligent accumulation of weeds and debris prevented utilization of a safer alternative method; in particular, at the pre-trial conference, HOLLAND's counsel discussed in depth the relevancy

of matters demonstrating the RAILROAD's knowledge of the accumulation of weeds and debris and its failure to remedy same in connection with the claims of negligence.

Under Federal cases and law, the amended pleadings were sufficient to advance the theory, recognized as a potentially viable one by the District Court of Appeal, that, as the appellate court characterized it, "the Railroad negligently foreclosed Appellant's use of that area of the track which, if used, would have permitted a safer operation than the operation actually employed." The allegations of HOLLAND's amended pleadings alleging negligence in failure to provide a reasonably safe place to work and in directing a hazardous method where there was a safer alternative method, under Federal notice pleading necessarily incorporated this theory of negligence. In this regard, the decision below conflicts with the opinion in *Bailey v. Central Vermont Ry,* 319 U.S. 350, 63 S.Ct. 1062 (1943). In reinstating the verdict for the plaintiff railroad employee that had been vacated by the Supreme Court of Vermont, this Court in *Bailey, supra,* found the evidence of the railroad's negligence in failing to provide the plaintiff with a safe place to work sufficient to support the jury verdict. Of particular significance here is the Court's finding that evidence presented to the jury of a safer alternative method of unloading the car, i.e., "the car could have been opened or unloaded near the bridge on level ground," was properly considered by the jury under the allegation of plaintiff's complaint that the railroad had failed to furnish plaintiff with "a safe place to do the work." (319 U.S. 1063-1064).

The decision below also conflicts with that of this Court in *Strickland v. Seaboard Air Line Railroad Co.,* 350 U.S. 893, 76 S.Ct. 157, (1955), where in a per curiam opinion, this Court granted the petition for writ of certiorari and reversed a judgment for the railroad, citing *Bailey v. Central Vermont Ry, supra.* In the original action before the Florida Supreme Court, *Seaboard Airline Railroad Co. v. Strickland,* 80 So.2d 914 (Fla. 1955), an action under the FELA, the plaintiff had secured a verdict. The plaintiff had been injured while changing an outside brake beam when he slipped and fell back against the switchbox while performing his work in a sitting, squatting or stooping position. Plaintiff had produced evidence that he could have changed the beam on a flat track over a pit while in a standing position rather than under the pullman car. There was evidence that it would have been safer to perform the work in the pit and that under those circumstances, the plaintiff could have had the assistance of a helper. The railroad presented evidence, though, that traditionally the work was done on a flat track and that had the pullman car been moved over a pit "it would not have been possible to get the trains out on time if they had to switch to a pit each car that they had to be worked on." (80 So.2d at 916).

In its original decision, the Supreme Court of Florida reversed a verdict and judgment for the injured plaintiff holding that proof of a safer place to work had no bearing on the issue of whether or not the method actually utilized, i.e., a flat track, constituted a reasonably safe place for the operation in question and that the evidence presented was insufficient to sustain a judgment for the plaintiff. In particular, the Supreme Court of Florida stated in its original opinion:

* * * * *

From what has been said, it is apparent that the plaintiff sought to prove the issue made by the pleadings — that is, whether the defendant was negligent in failure to provide him with a reasonably safe place to work — by showing that the footing and lighting were better in a pit, where plaintiff could have had a helper, and that it was unreasonable — and thus negligent — for defendant to require him to do the work on a flat track when a pit was available. There can be no doubt that there were sufficient 'probative facts', if believed by the jury, to show that it was easier and safer to change a brake beam in a pit rather than on a flat track. But we know of no rule of law which requires a railroad company to provide a workman with an easier and safer place to work if the one provided is, as a matter of fact, reasonably safe . . . . (80 So.2d at 917).

The United States Supreme Court reversed under the liberal interpretation of the FELA, citing *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 63 S.Ct. 1062, (1943). On remand, the Supreme Court of Florida necessarily decided, in accordance with the mandate, that the evidence was sufficient to create a jury question under the pleading alleging negligent failure to provide a safe place to work.[3]

[3]Errors with regard to attorney conduct and admissibility of other evidence resulted in reversal for a new trial (88 So.2d at 520-524); but the Florida Supreme Court was compelled to hold and did hold that a case of causative FELA negligence was made out by the proof of the safer alternative — which was not used because the railroad precluded it; it was not used because of railroad custom and because it would not have been possible to get the trains out on time if the railroad had to switch each car which had to be worked on to a pit.

The decision below also conflicts with a decision of the highest State court of Utah, recognizing that allegations of negligence in failing to furnish a safe place to work in an FELA action are sufficient to permit evidence of safer methods of work. In *Mooney v. Denver & R.G.W.R.Co.*, 257 P.2d 947 (Utah 1953), a safer method of work was precluded by the railroad's alleged negligent scattering of tools throughout a railroad car which necessitated the plaintiff working in a restricted area while releasing a flat car handbrake. Because the railroad had been negligent in permitting the tools to be scattered throughout the car, the plaintiff had very little room to stand and was unable to get directly behind the brakestaff while performing his work. The Supreme Court of Utah discussed the testimony regarding the scattered tools and concluded that a jury instruction outlining the plaintiff's claim of negligence against the railroad for failure to furnish a safe place to work was correct. The railroad challenged the instruction as "not within the pleadings or supported by the evidence." The Court rejected the railroad's argument, reasoning that testimony of the tools scattered throughout the car precluding utilization of a safer method of operation "present a jury question concerning negligence or non-negligence in failing to furnish a safe working place, — thus justifying the instruction mentioned." (257 P.2d at 949).

The decision below also conflicts with the above-cited cases regarding notice pleadings under FELA law insofar as it holds that the fact that BOBBY HOLLAND did not "traverse the area said to have been overgrown with weeds and strewn with debris" rendered the proffered evidence inadmissible under a general pleading alleging the RAILROAD negligently failed to provide a

reasonably safe place to work. *Strickland* and *Bailey, supra,* allowed proof of an unused alternative method to establish negligence in the method or area actually used. Additionally, under liberal Federal notice pleadings announced by the Court in *Conley v. Gibson, supra,* the District Court of Appeal's narrow construction of evidence that may be presented to prove "failure to provide a reasonably safe place to work" cannot be sustained.

a.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT FEDERAL SUBSTANTIVE RIGHTS MAY NOT BE INFRINGED UNDER LOCAL PRACTICE — SPECIFICALLY HOLDING THAT LOCAL PLEADING REQUIREMENTS MAY NOT INFRINGE FEDERALLY CREATED RIGHTS.

In *Brown v. Western Railways of Alabama,* 338 U.S. 294, 70 S.Ct. 105 (1949), it was specifically held that local rules of practice and burdensome rules of pleading could not be utilized to defeat a right of recovery under the FELA and that the United States Supreme Court, in an FELA case, would not and could not accept as final a State Court's interpretation of allegations in a complaint asserting a right under the FELA. In FELA actions, Federal Courts interpret pleadings in the interest of uniformity of Federally created rights. The Court announced:

* * * * *

> Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by Federal laws. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. (Citations omitted) Should this Court fail to

protect federally created rights from dismissal because of over exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved . . . (338 U.S. at 298-299).

The dismissal of a complaint under the FELA by the State Courts of Missouri because of stringent pleading requirements in Missouri was reversed in *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018 (1949). The Court concluded that the allegations of the complaint stated a cause of action for negligence under the FELA pursuant to Federal law and that such a determination should not vary in accordance with differing pleading requirements under State and local laws. The Court further noted that any purported insufficiency of allegations in the complaint as to the particular type and cause of a maladjustment in the equipment would not accord with applicable Federal standards in such cases and, in any event, "the matter was at most one for permitting amendment or cure by proof." (337 U.S. at 179, F.N. 17)[4] *Accord, Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360, 77 S.Ct. 840, (1957); *Dice v. Akron, C & Y.R. Co.*, 342 U.S. 359, 72 S.Ct. 312, (1952).

Here, BOBBY HOLLAND pled not only that the RAILROAD was negligent in failing to provide a reasonably safe place to work, but further pled that the

[4]Similarly, if indeed Holland's potential theory of liability that was excluded by the Court below "was a step away from the pleaded theories," under liberal Federal practice applicable in FELA actions, the pleadings should have been amended to conform to the proof. See, *Watson v. Canon Shoe Co.*, 165 F.2d 311 (5th Cir. 1948); *Green v. Baltimore & Ohio Railroad Co.*, 299 F.2d 837 (6th Cir. 1962).

RAILROAD negligently directed the train crew to pick up cars on the pass track in a manner and method known by the defendant to be hazardous, when there was a safer alternative method of accomplishing the same objective. The pleadings were more than sufficient under Federal law to allow the precluded proof — which the First District Court of Appeal here acknowledged might well have constituted "a potential theory of liability." BOBBY HOLLAND has been deprived of his substantive rights under the Federal Employers' Liability Act through the restrictive pleading requirements announced by the District Court of Appeal.

2.

THE DECISION BELOW SEVERELY UNDERMINES THE FORCE AND EFFECT OF THE FEDERAL EMPLOYERS' LIABILITY ACT BY HOLDING THAT AN ERRONEOUS EXCLUSION OF ONE OF THE PLAINTIFF'S THEORIES OF NEGLIGENCE IS HARMLESS ERROR, RAISING SIGNIFICANT PROBLEMS INSOFAR AS ASSURING A CORRECT AND UNIFORM APPLICATION OF THE FELA IN STATE AND FEDERAL COURTS.

The First District Court of Appeal of Florida held that the exclusion of proof of the RAILROAD's negligent preclusion of a safer operation than that actually employed, even if admissible, constituted harmless error under Florida Statute Sec. 59.041 (1975). The Opinion states:

* * * * *

> Moreover, when viewed in the context of a lengthy and complicated trial of numerous liability issues, any error in the trial court's refusal to permit exploration of yet another theory was harmless. Sec. 59.041, Florida Statutes (1975). The jury considered and rejected Appellant's proof that the particular method used to move the train at the time and place of his injury was unreasonably dangerous. We find no miscarriage of justice after examination of the entire record.

The District Court of Appeal's Opinion in this case has a far reaching impact on the issue of uniform treatment of FELA actions filed in State courts. Relying upon a State harmless error statute, the District Court of Appeal of Florida has deemed the erroneous exclusion of a potential theory of liability in an FELA action to be "harmless error", reasoning that the excluded liability testimony was "yet another theory" in a "complicated trial of numerous liability issues" where the jury had not found the particular method utilized for the switching movement to be "unreasonably dangerous."

A State harmless error statute simply should not apply in an FELA case so as to permit the exclusion of proof of a viable, independent theory of FELA liability.

The error simply cannot be harmless where a finding of an unreasonably safe place to work can arise out of proof of a safer alternative, the use of which the RAILROAD improperly foreclosed. *Strickland v. Seaboard Air Line Railroad Co.*, 350 U.S. 893, 76 S.Ct. 157, (1955). Where a jury, as here, was presented with the question of whether the method actually used was unreasonably dangerous, proof of a safer alternative method is directly relevant on the issue of negligence. The proof of an alternative method, which the RAILROAD through its own fault precluded, has a direct bearing on jury evaluation in an FELA case, — especially in light of the slight evidence of causative negligence that is required. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957).

The decision below, insofar as it holds that the exclusion of a viable theory of negligence — negligent preclusion of a safer alternative method — constitutes

harmless error under a State harmless error statute directly conflicts with the decision of the Second Circuit in *Eggert v. Norfolk & W. Ry. Co.*, 538 F.2d 509 (2d Cir. 1976). The negligent preclusion of a safer method of performing a particular railroad function was sufficient, alone, to sustain a finding of negligence since it could not be said that the negligent preclusion of the safer method "played no part at all in the injury to plaintiff and it was therefore error to prevent submission of the issue to the jury." (538 F.2d at 512). In *Eggert, supra,* the plaintiff was the fireman for the railroad and was responsible for transmitting signals from the ground crew to the engineer. The plaintiff ordinarily sat in the rear seat in the engine cab but since the front seat was defectively turned to one side and would not swivel properly, there was insufficient leg room to allow plaintiff to fit in the rear seat and he instead sat on the broken front seat. Since plaintiff was not sitting on the rear seat and the front seat did not swivel properly, it was necessary for plaintiff to get up and walk to the rear seat to look for the signal from the ground crew. While the plaintiff was moving between seats, the "slack action" caused by the momentum of the coupled cars knocked plaintiff off-balance and he fell. The Second Circuit reversed a directed verdict for the railroad since a jury could reasonably find that, as here, a properly functioning front seat would have permitted the utilization of a safer alternative method. The Court further reasoned that under the FELA, the right of the jury to pass upon the question of fault and causation must be most liberally viewed and, in that context, it could not be said — while the evidence was perhaps "slim" — that the broken seat played no part at all in the injury to plaintiff. Therefore, it was error to prevent the submission of the issue to the jury.

The conflict with *Eggert* is clear since BOBBY HOLLAND's proffered proof shows that the RAILROAD's negligent failure to eliminate the high weeds and debris precluded a safer switching movement which would have eliminated the need for BOBBY HOLLAND to ride backwards in the dark for approximately one-half mile. It was during this hazardous back-up movement that BOBBY HOLLAND fell to the ground and lost both legs. Under applicable FELA case law, a jury verdict could be sustained on the sole issue of the RAILROAD's negligent preclusion of the safer method of performing the switching movement so that the exclusion of this theory from consideration by the jury is necessarily prejudicial and the Florida harmless error statute should not be applied to defeat Holland's claim. *Accord, Mooney v. Denver & R.G.W.R. Co.*, 257 P.2d 947 (Utah 1953); *Stone v. New York, C. & St. L.R.Co.*, 344 U.S. 407, 73 S.Ct. 358 (1953); *Boston & M.R.R. v. Meech*, 156 F.2d 109 (1st Cir. 1946) cert. den. 329 U.S. 763 (1946); *Rodriquez v. Delray Connecting Rd.*, 473 F.2d 819 (6th Cir. 1973).

3.

THE EXCLUSION OF PROOF OF A VIABLE THEORY OF LIABILITY IN AN ACTION ARISING UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, BECAUSE OF LOCAL PLEADING RULES, CONSTITUTES DEPRIVATION OF RIGHT TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The decision below departs from the Rule pronounced by this Court that an injured employee's right to a trial by jury in an FELA case cannot be defeated or restricted by local rules of pleading and practice. *Brown v. Western Railway of Alabama,* 338 U.S. 294, 296, 70 S.Ct. 105, 106 (1949); *Bailey v. Central Vermont Ry.,* 319 U.S. 350, 354, 63 S.Ct. 1062, 1064 (1943); *Dice v. Akron, C. & Y.R.Co.,* 342 U.S. 359, 363, 72 S.Ct. 312 (1952).

This Court announced in *Dice, supra:*

* * * * *

> We have previously held that "the right to trial by jury is 'a basic and fundamental feature of our system of Federal jurisprudence' " and that it is "part and parcel of the remedy afforded railroad workers under the Employers Liability Act. *Bailey v. Central Vermont R.Co.,* 319 U.S. 350, 354, 87 L.Ed. 1444, 1447, 63 S.Ct. 1062. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence "is to take away a goodly portion of the relief which Congress has afforded them." It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere "local rule of procedure" for denial in the manner that Ohio has here used. *Brown v. Western R.Co.,* 338 U.S. 294, 94 L.Ed. 100, 70 S.Ct. 105 (342 U.S. at 363).

The decision below sanctions the elimination of a viable theory of negligence from consideration by the jury because of local pleading rules. This action constitutes a denial of BOBBY HOLLAND's right to a jury trial under the Seventh Amendment to the Constitution of the United States.

4.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND COURTS OF APPEALS AS TO THE INCLUSION OF A JURY CHARGE ON LEGAL CAUSE UTILIZING THE "BUT FOR" TEST OF PROXIMATE CAUSE, IN A CASE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

In charging upon the FELA, the trial court defined legal cause as follows:

* * * * *

> Negligence is a legal cause of injury if it directly and in a natural and continuous sequence produces, or contributes to producing such injury so that it can reasonably be said that but for the negligence, the injury would not have occurred.

The First District Court of Appeal concluded that "the instruction was incorrect, however, in charging the jury it must find that 'but for the negligence, the injury would not have occurred.' " The Court further held, however, that the charge was harmless error since throughout the remainder of the charge, the jury was appropriately instructed that it should find for the plaintiff if any improper act on the part of the RAILROAD "contributed in whole or in part" to the plaintiff's injury. According to the Court, the error was not "of sufficient magnitude to require reversal" and "we find the charge as given does not rise to the level of reversible error."

The decision below departs from decisions of this Court announcing that under the FELA, if railroad negligence played any part, however small, in the happening of the accident, the injured employee still could prevail. As this Court held in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957):

* * * * *

> Under this Statute (FELA) the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought . . . . The Statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence.
>
> The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The Statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes, the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may

with reason make that inference. (352 U.S. at 502-503).

In *Rogers*, the United States Supreme Court flatly rejected the "but for" test that had been applied by the Missouri Court, holding that language of proximate causation (i.e., "but for") simply does not belong in an action arising under the Federal Employers' Liability Act. *Accord, Harris v. Pennsylvania R. Co.*, 361 U.S. 15, 80 S.Ct. 22 (1959).

The "but for" proximate causation instruction to the jury could not be harmless in this FELA case where, as recognized by this Court, the crucial question is "whether there was evidence that *any* employer negligence caused the harm, or more precisely, enough to justify a jury's determination that employer negligence had played *any* role in producing the harm." *Gallick v. Baltimore and Ohio Railroad Company*, 327 U.S. 108, 116, 83 S.Ct. 659, 664 (1963). The applicable standard, as expressed by the Third Circuit Court of Appeals in *Pehowic v. Erie Lackawanna Railroad Company*, 430 F.2d 697, 700 (3d Cir. 1970), in a FELA case is that all that need be shown is that there be greater than a "zero probability either of employer negligence or that any such negligence contributed to the injury of an employee", to support a finding of negligence and causation. *Accord, Eglsaer v. Scandrett*, 151 F.2d 562 (7th Cir. 1945).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the District Court of Appeal of Florida, First District.

Respectfully submitted,

WALTER H. BECKHAM, JR., Esquire
JOEL D. EATON, Esquire
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

LAWRENCE V. HASTINGS Esquire
300 71st Street, Suite 530
Miami Beach, Florida 33140
Counsel for Petitioner

PODHURST, ORSECK & PARKS, P.A.
25 West Flagler Street
Miami, Florida 33130

SUSAN GOLDMAN, ESQUIRE
PH I, Roberts Building
28 West Flagler Street
Miami, Florida 33130

HASTINGS AND GOLDMAN
300 71st Street, Suite 530
Miami Beach, Florida 33140

Of Counsel

January 24, 1979

Appendix

Index to Appendix

Decision and Opinion of the District Court of Appeal of Florida, First District, dated December 20, 1977 ..... App. 1-7

First Amended Complaint ..... App. 7-13

Order Denying Plaintiff's Motion for New Trial ..... App. 13-19

Excerpt from Pre-Trial Conference of November 26, 1975 ..... App. 20

Excerpt from Deposition of Roger Banks .. App. 20-21

Excerpt from Deposition of Shirley Davis .. App. 22-24

Excerpt from Deposition of William Huckeba ..... App. 24-26

Excerpt from Deposition of Earl Williams . App. 26

Excerpt from Deposition of James Sherrod App. 27-28

Proffer of Witness Zadnichick ..... App. 28-29

Proffer of Witness Thompson ..... App. 30-35

Diagrams from Appellant's Reply Brief Demonstrating Switching Move as Made, and Alternative Safer Method Precluded by Weeds ..... App. 36-41

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A. D. 1977

CASE NO. DD-152

BOBBY WADE HOLLAND,
Appellant,

vs.

SEABOARD COAST LINE
RAILROAD COMPANY,
Appellee.

Opinion filed December 20, 1977.

ERVIN, J.

Appellant Bobby Holland brought this action under the Federal Employers' Liability Act (FELA) for grievous personal injuries suffered while an employee of the appellee Seaboard Coast Line Railroad Company. He alleged numerous acts of negligence and statutory violations that resulted in his injuries. The jury, however, found for the railroad.

Appellant was injured in a switching movement. He first contends the trial judge erred in excluding evidence that the railroad failed to remove high weeds and debris adjacent to the track and roadbed near the accident scene, and that the weeds and debris made walking

there at night dangerous. As the trial court held in its order denying a new trial, the proffered evidence was not admissible under any pleaded theory of negligence. Appellant's amended complaint, as further amended, alleged the railroad was negligent in several respects, among them in failing to furnish appellant a reasonably safe place in which to work and in negligently directing the train crew to pick up cars by a hazardous method "when there was a safer alternative method of accomplishing the same objectives."

The proffered evidence was not admissible to prove the railroad failed to provide appellant a reasonably safe place to work, because appellant did not traverse the area said to have been overgrown with weeds and strewn with debris. Appellant's argument for the admissibility of his proffered evidence is that by permitting an accumulation of weeds and debris, the railroad negligently foreclosed appellant's use of that area of the track which, if used, would have permitted a safer operation than the operation actually employed. That theory may well have been a potential theory of liability, but in causative terms it was a step away from the pleaded theories. The bare mention of that theory of potential liability in the pretrial conference held a few days before trial, during counsel's argument on the scope of proper discovery in the latter states of preparation, did not amend the complaint so as to require expansion of the liability theories at trial.

Moreover, when viewed in the context of a lengthy and complicated trial of numerous liability issues, any error in the trial court's refusal to permit exploration of yet another theory was harmless. Section 59.041, Florida Statutes (1975). The jury considered and rejected ap-

pellant's proof that the particular method used to move the train at the time and place of his injury was unreasonably dangerous. We find no miscarriage of justice after examination of the entire record.

Appellant's second point concerns the jury instruction defining negligence. The trial judge charged: "Negligence is a legal cause of injury if it directly and in a natural and continuous sequence produces, or contributes to producing such injury so that it can reasonably be said that but for the negligence the injury would not have occurred."

Since Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500 (1957), the test in FELA actions for determining employer negligence is simply whether it played any part, even the slightest, in producing the injury for which damages are sought. The burden of the employee is met, and the obligation of the employer to pay damages arises when there is proof, though circumstantial, from which the jury may with reason make that inference. This reasoning was adopted by the Florida Supreme Court in Atlantic Coast Line Railroad Company v. Barrett, 101 So.2d 37 (Fla. 1958). Therefore, the above quoted instruction is correct in saying the railroad's negligence is a legal cause of injury if it *"produces* or *contributes to producing"* such injury. The instruction was incorrect, however, in charging the jury, it must find that *"but for* the negligence the injury would not have occurred."

If our appellate task ended upon determining the instruction was in part incorrect, a new trial would be mandated. However, we must also determine whether the error was of sufficient magnitude to require reversal,

considering the charge as a whole. McCalley v. Seaboard Coast Line Railroad Company, 265 So.2d 11 (Fla. 1972). *McCalley* involved an alleged violation of the Federal Safety Appliance Act, 45 USC §2, which employs the same causal test as the FELA in determining an employer's negligence. During trial the jury was repeatedly instructed that a verdict should be returned for the defendant if the alleged negligence was found not to be the proximate cause of plaintiff's injuries. The Supreme Court found the concept of proximate cause plays no part in an action under the Federal Safety Appliance Act, and further, the repeated use of the term "proximate cause", together with an erroneous instruction from a 1933 pre-*Rogers* decision, constituted reversible error.

We find the charge as given does not rise to the level of reversible error. The offending "but for" language was used only once during the extensive instructions to the jury. The trial judge throughout his charge informed the jury it should find for the plaintiff if any improper act on the part of the railroad "contributed in whole *or* in part" to the plaintiff's injury. In order to determine if any prejudice resulted to Mr. Holland, we reviewed the argument of defense counsel and found no reference to the "but for" test for determining the negligence of the railroad. Defense counsel's brief reference to causation in his argument is consistent with FELA law: "They have got to show that something is defective, something isn't working, that it played some part in the accident here."

Finally, the prejudicial effect of that portion of the offending instruction is belied by the second paragraph following it:

> "Now, under the Federal Employers' Liability Act the defendant Railroad Company is liable if the defendant, his agents, servants, or employees, acting in the scope of their agency or employment were negligent and the negligence played any part, however small, in producing the injury for which damages are sought."

The jury, after nine days of trial, concluded the railroad was guilty of no improper act making it responsible for Mr. Holland's injuries. We are sympathetic to his plight. But we are compelled to find a fair trial was conducted and a sufficient factual basis existed for the jury's verdict.

We have considered the remaining points on appeal and find no error. The judgment is

AFFIRMED.

MELVIN, J., CONCURS. SMITH, Acting Chief Judge, CONCURRING WITH OPINION.

SMITH, J., concurring:

I concur in the court's decision and in all of Judge Ervin's opinion except that part which finds error, albeit harmless error, in the trial court's adaptation of Florida's Standard Jury Instruction 5.1a to the FELA context. Charge 5.1a reads

> Negligence is a legal cause of injury if it directly and in natural and continuous sequence produces or contributes *substantially* to producing such injury, so that it can

reasonably be said that, but for the negligence, the injury would not have occurred. (Emphasis added.)

The trial court excised "substantially" from the charge given the jury at this trial, thus properly accommodating the charge to an FELA case. The trial judge might also have charged the jury, but was not requested to do so, with an appropriate revision of charge 5.1b on concurring cause:

> In order to be regarded as a legal cause of injury, negligence need not be the only cause. Negligence may be a legal cause of injury even though it operates in combination with some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes [omitting *substantially*] to producing such injury.

In my view the "but for" language simply requires a causative relationship which must be demonstrated even in FELA cases. The feature that distinguishes FELA cases from others is that the causative effect of the railroad's negligence may be "slight," not "substantial," and yet be actionable. Other portions of the trial court's jury charge made that point clearly. I do not conceive that the charge was error, harmless or otherwise. See Funseth v. Great Northern Ry. Co., 399 F.2d 918 (9th Cir. 1968), cert. den., 393 U.S. 1083; Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975) (discussing identical causative requirements under the Jones Act); 3 Devitt & Blackmar, Federal Jury Practice and Instructions §94.13 (3d ed. 1977).

The charge here did not speak in terms of "proximate cause," which the Supreme Court found offensive in Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957). Rather, it further ameliorated Florida's SJI 5.1a on "legal cause," which itself ameliorated the more stringent requirements for proof of "proximate cause."

FIRST AMENDED COMPLAINT

THE PLAINTIFF, BOBBY WADE HOLLAND, sues the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a railroad corporation, and says:

COUNT I

CLAIM OF PLAINTIFF AGAINST THE DEFENDANT, SEABOARD COAST LINE RAILROAD COMPANY, UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

1. At all times material hereto, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, was a corporation having its office and principal place of business at 300 Water Street, Jacksonville, Florida, from which address it directs and controls its railroad system.

2. At all times material hereto, the Plaintiff, BOBBY WADE HOLLAND, was an employee of the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, acting in the course and scope of such employment.

3. At all times material hereto, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, was engaged as a common carrier in interstate or foreign commerce by a railroad, which embraced and included the work and employment of the Plaintiff, and the Plaintiff was engaged in an activity that affected transportation in interstate commerce.

4. On or about October 17, 1973 at approximately 5:30 A.M., in the vicinity known as "School Bus Crossing:, Tifton, Georgia, the Plaintiff was working as a brakeman on SEABOARD COAST LINE train 305, which operates from Albany, Georgia to Waycross, Georgia, and was engaged in picking up approximately 26 cars at the Tifton pass track, during which pick-up the Plaintiff was severely injured when the Plaintiff was whipped and thrown from the last car in a group of approximately 39 cars being shoved back to join train 305 on the mainline track, and as a result the Plaintiff struck the track on or between the rails causing the wheels of approximately 21 cars of the train to run over the Plaintiff.

5. The Defendant, SEABOARD COAST LINE RAILROAD COMPANY, and/or its agents, servants or employees, were guilty of one or more of the following negligent acts or negligent omissions which caused or contributed to the cause of the Plaintiff's injuries and damages as hereinafter alleged:

(a) In negligently constructing, or operating or maintaining its said railroad cars, engines, or other equipment, or other appliances.

(b) In negligently failing to furnish the Plaintiff reasonably safe place in which to work.

(c) In negligently failing to furnish Plaintiff respectively safe cars, engines, or other equipment with which to do his work.

(d) In negligently operating the said engine shoving back the 39 cars without constant radio communication with the Plainfiff brakeman.

(e) In negligently operating the said engine with defective radio communication between the engineer and the Plaintiff brakeman.

(f) In negligently operating the said engine contrary to the Plaintiff's signals.

(g) In negligently operating the said engine in disregard of the Plaintiff's signals.

(h) In negligently operating the said engine so as to cause excessive slack action.

(i) In negligently failing to give the Plaintiff reasonable warning of a dangerous and/or unsafe condition.

(j) In negligently failing to supply and make available proper radio appliances for use by the Plaintiff.

(k) In negligently failing to maintain a proper radio communication system.

6. That as a result of the said event, the Plaintiff sustained personal injuries to his head, neck, back, shoulders, including body and extremities and injuries to his nervous system, more particularly the loss of the Plaintiff's right leg at the hip and left leg at the knee; and including permanent scarring of the shoulders; and other injuries not as yet diagnosed; said injuries and the conditions resulting therefrom are continuing in their nature, so as to cause him injury, pain and disability and that the said conditions aforesaid will reasonably be expected to continue for sometime in the future.

7. As a result of his said injuries, the Plaintiff was compelled to seek medical attention, hospitalization, surgical procedures and to incur medical expense for the treatment of his said injuries and for travel necessary to secure such medical treatment; and that in the future he will be compelled to incur similar expenses for such medical care, hospitalizations, surgical procedures, and travel.

8. As a further result of his injuries and the conditions resulting therefrom, the Plaintiff's earning capacity and working ability were impaired; and in the future he will suffer future loss of his earning capacity and his ability to work.

9. As a further result of his said injuries, the Plaintiff suffered physical handicap and disability in connection with his usual activities and recreation, and will continue so to suffer such handicap and disability into the future.

10. As a further result of his said injuries and the conditions resulting therefrom, the Plaintiff suffered great humiliation and embarrassment; great mental pain and suffering, and will continue so to suffer in the future.

WHEREFORE, the Plaintiff sues the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, and demands judgment in excess of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) with interest and the costs of this action; and demands trial by jury of all issues triable as of right by a jury.

COUNT II

CLAIM OF PLAINTIFF AGAINST THE SEABOARD COAST LINE RAILROAD COMPANY UNDER THE BOILER INSPECTION ACT

11. The Plaintiff adopts and incorporates each and every allegation of Paragraphs 1 through 4 above.

12. The injuries to the Plaintiff occurred as the result of a defective engine radio receiver whereby the engineer was unable to hear the Plaintiff's signals.

13. The Defendants were in violation of the Boiler Inspection Act and the Safety Appliance Act in the following respect:

(a) That the locomotive radio was defective and not serviceable for the use intended.

(b) That the locomotive brakes were defective and inadequate.

(c) That the train brakes were defective and inadequate.

(d) That the engine's radio communications system was defective.

14. The Plaintiff adopts and incorporates each and every allegation of Paragraphs 6 through 10 above.

WHEREFORE, the Plaintiff sues the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, and demands judgment in excess of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) together with interest and the costs of this action, and demands trial by jury of all issues triable as of right by a jury.

MOTION TO AMEND AMENDED COMPLAINT

COMES NOW, the Plaintiff, by and through his undersigned attorneys, and moves this Honorable Court, pursuant to F.R.C.P. 1.190, for leave to amend his Amended Complaint previously filed herein by interlineation and to add thereto in Court I, paragraph 5 an additional allegation of negligence by subparagraph (1), thereof, all of which is in the furtherance of justice and which amendment reads as follows:

(1) In negligently instructing and/or directing the train crew to pick up cars on the pass track in a manner and method as was

known by the Defendant to be hazardous when there was a safer alternative method of accomplishing the same objectives.

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff's motion for new trial, after being twice continued, was argued before this Court on May 27, 1976. The plaintiff has listed 28 reasons why the Court should set aside the judgment entered on the jury verdict on this case and grant a new trial. However, during the arguments on the motion, plaintiff's counsel argued basically three of these reasons, namely, Nos. 4, 7 and 21. However, the Court has considered all of the reasons set forth in plaintiff's motion and has studied the cases cited by the parties during the arguments, and after due deliberation, the plaintiff's motion for new trial is denied.

The Court feels impelled to detail its reasoning for denying a new trial.

It is undisputed that the plaintiff in this case suffered grievous injuries, and if the case were to be decided on sympathy, there is no doubt but that a new trial would be granted. But, of course, this is not the standard to be applied nor was it the standard for the jury to apply in reaching their verdict.

Reason No. 4 in plaintiff's motion states that "the verdict is contrary to the manifest weight of the evidence". However, the verdict is amply supported by the evidence in this case and the jury could easily have found that the railroad was not at fault. Reasons Nos. 9

through 24 urge as error: failure of the Court to give some of the plaintiff's requested instructions, failure of the Court to give in their entirety some of plaintiff's requested instructions, and the giving by the Court of some of defendant's requested instructions. Plaintiff alleges that defendant was liable under the Federal Employers' Liability Act, Safety Appliance Act, Boiler Inspection Act and the Power Brake Law. The instructions as given to the jury adequately and properly instructed them as to each of these statutory duties. 45 U.S.C.A. §1, et.seq.; 45 U.S.C.A. §51, et.seq.; Rogers vs. Missouri Pacific Railroad Co., 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443; Bertrand vs. Southern Pacific Co., 282 F.2d 569 (9th Cir., 1960); Idzojtic vs. Pennsylvania Railroad Co., 431 F.2d 1029 (3rd Cir., 1970); Ely vs. Reading Company, 424 F.2d 758 (3rd Cir., 1970).

Plaintiff's counsel has spent a great deal of time urging upon this Court their contention that excluding evidence concerning weeds and grass allegedly located south of the pass track switch in Tifton, Georgia was the reason that the jury returned an adverse verdict against plaintiff. No doubt this will be the primary contention on appeal. Plaintiff's counsel *now* claims that the entire thrust of their case under the FELA aspect of the case was their contention that weeds growing along the mainline south of the pass track switch between Tifton and Waycross, Georgia was the reason for the particular move which was being made at the time of the plaintiff's injury. Otherwise, they contend, it would have been made differently as the defendant knew the move which was made on the night of the plaintiff's accident was unsafe.

It is to be noted that this contention was not mentioned at all in the plaintiff's original complaint, Count I (their FELA Count), which set forth eleven specific allegations of negligence, none of which made any mention whatsoever of weeds south of the pass track switch, but rather the majority of them were allegations of negligent train handling in contributing to the cause of plaintiff's injury. The plaintiff filed a first amended complaint which again set forth eleven allegations of negligence, and again failed to mention anything about weeds south of the pass track switch.

It is perfectly clear that their primary thrust in alleging negligence dealt with train handling, negligent communications and/or a negligent communication system. Following this, the plaintiff further amended his complaint on several occasions, supplementing their allegations under their Counts dealing with Safety Appliance Act, Boiler Inspection Act and one further allegation under their FELA Count which read:

> "In negligently instructing and/or directing the train crew to pick up cars on the pass track in a manner and method as was known by the defendant to be hazardous when there was a safer alternative method of accomplishing the same objective."

Plaintiff's contention also is not supported by plaintiff's counsel's opening statement to the jury. During his opening statement he mentioned about fourteen theories of liability under the FELA, Safety Appliance Act, Boiler Inspection Act and Power Brake Law. Near the end of his opening statement and while discussing the alternative means by which the cars could have been

picked up, plaintiff's counsel mentioned weeds south of the pass track switch in a sense which virtually contradicted his earlier statement that using that area was an alternative method, as from his statement concerning weeds it appeared that it was not a reasonable alternative. Thus, from the issues as framed by the pleadings, as well as plaintiff's counsel's opening statement, it is clear to this Court that their present contention that the primary thrust of their case involved the weeds theory is an afterthought when trying to review in their minds why the jury returned an adverse verdict to them.

During the trial, the testimony was uncontradicted that the method which was being employed to pick up the cars from the pass track had been used by the defendant for over twenty-five years without *any* complaints from employees or mishaps of any kind. Further, the evidence at trial was undisputed that the track crew, of which the plaintiff was a member, used the same method on the morning of the plaintiff's accident. During arguments (held outside of the presence of the jury) concerning this point, plaintiff's counsel was unable to show that there was any connection whatsoever between any weeds or lack of weeds located south of the pass track switch and the method which was decided upon by the plaintiff's crew to pick up the cars from the pass track. It was not necessary to rule on the admissibility of the profferred testimony relating to the defendant's knowledge or lack of knowledge of any weeds south of the pass track switch during a reasonable period prior to plaintiff's accident (plaintiff proffered one or two letters which predated the accident by four or five years) as there is no question but that under the issues as framed by the pleadings and testimony at trial that evidence of

weeds or lack of weeds south of the pass track switch had absolutely no relevancy or materiality in this case.

The plaintiff was allowed to put on testimony from their expert who testified that the method being employed by the defendant at the time of plaintiff's accident was unsafe and then testified as to four alternative methods which would have been, in his opinion, reasonably safe alternative methods which should have been used. The jury was appropriately instructed to the effect that the general custom of the defendant railroad in picking up the cars did not justify or excuse negligence and that in determining whether or not the defendant failed to provide the plaintiff with a reasonably safe place to work, etc., they could consider the alternative methods. After carefully considering the pleadings, trial testimony and the law, it is clear that the plaintiff's attempt to put in evidence concerning weeds which had nothing to do with the plaintiff's accident was properly excluded. Black vs. Penn Central Co., 507 F.2d 269 (6th Cir., 1974); Smith vs. Illinois Central R. R. Co., 486 F.2d 943 (5th Cir., 1974); Dobson vs. Grand Truck Western Railroad Co., 248 F.2d 545 (7th Cir., 1957); Atlantic Coastline Railroad Co. vs. Darden, 216 F.2d 125 (5th Cir., 1954); Mensen vs. Baltimore and Ohio Railroad Co., 250 N.E.2d 303.

During the oral arguments on their motion for new trial, plaintiff cited several cases in support of their contention that the evidence concerning the weeds or lack thereof should have been admitted at the trial, and I have read those cases and feel that they are clearly not applicable to this case. Cereste vs. New York, New Haven and Hartford R. Co., 231 F.2d 50 (2nd Cir., 1956), involved an employee who tripped over a lump of coal

between a set of tracks, which is a situation almost completely opposite of that involved in this case, wherein the plaintiff was riding a boxcar from which he fell. Another case cited by the plaintiff during oral argument was Chicago, B. & O. R. Co. vs. Kelley, 74 F.2d 80 (8th Cir., 1934), which involved weeds that had accumulated on tracks which then caused a braking locomotive to slide further than normal into a cut of cars. The only similarity between that case and this case is the word "weed" as it is clear that in that case the weeds had something to do with causing or contributing to the accident, whereas in this case there was no connection between the plaintiff's accident and any alleged weeds south of the pass track.

The jury was told at the outset of the case that it was expected that the entire trial would last approximately three or four days. Actually, the plaintiff's case lasted seven full days with the liability phase of their case consisting of putting on testimony concerning switching operations, braking systems (including very detailed and technical evidence of engine and train brake systems), radio systems (including very technical aspects of radio sensitivities, gain, etc.) and the details of the movements being made at the time of plaintiff's accident. As the plaintiff's case wore on, it was obvious that the jury of six women was becoming inattentive and bored and I informed both counsel of this observation on several occasions. It was obvious that the length of time in which it took the plaintiff to present his case and the type of testimony presented was completely boring to the jury. On the other hand, the defendant's case was presented clearly, concisely and briefly and was listened to most attentively by the jury.

While there were numerous factual issued to be resolved by the jury, perhaps the two most important were: (1) Whether or not the engine and cars were handled in a negligent manner and thus produced unusual and severe slack action, or whether they were handled reasonably and produced normal slack action, if any; and (2) Whether or not the plaintiff was riding the side of the leading boxcar, as he testified, or whether he was riding the end of the leading boxcar at the time of his accident.

After deliberating for approximately three hours, the jury returned their verdict resolving the factual issues in favor of the defendant and against the plaintiff.

I find no basis to disturb the jury verdict in this case.

It is therefore

ADJUDGED that plaintiff's motion for new trial be, and the same, is hereby, denied.

DONE AND ORDERED at Jacksonville, Florida, this 29th day of July, 1976.

/s/ Marion W. Gooding
CIRCUIT JUDGE

EXCERPT FROM PRETRIAL CONFERENCE

MR. HASTINGS: Your Honor, so you understand what we are talking about, because this is a factual situation, what it is in essence in this particular area where this movement is taking place, there are high weeds, we are alleging, and there is a lot of debris. As a result of these extremely high weeds and debris, they had to do the movement not the way we feel it should have been done and we will produce evidence to say it shouldn't have been done because I say if you try to do it in this area where weeds are, you are bound to fall or trip. It is dangerous at night and an accident can happen. In any event, it is because of these weeds, that is one of the causal factors of this accident. We want to prove this is so through these particular communications we are talking about. Not only is this a dangerous condition that existed there and caused that particular movement to be necessary, but the railroad was warned not once but told many times that these weeds were high. There is debris. They were told many times and the railroad has correspondence from the working people to the effect that this condition is intolerably bad and this should be cleared up or a different movement should be made.

DEPOSITION OF ROGER BANKS

Q All right. Are you familiar with the area south of the south pass — south switch of the south pass track at Tifton as the same was in October, or on October 17th of 1973, specifically on October 17th?

A Yes, sir, I am. I was there.

Q Can you describe that area on the main line just south of the south pass track?

A South of the south pass switch? Is that right?

Q Yes.

A Pretty well grown up, had some tie butts laying on the right of way, weeds were approximately, I guess, about waist high.

Q All right. Were the weeds thick?

A Yes, sir, they were pretty thick.

Q Did that affect the manner in which the pickup of cars off that pass truck was conducted by your crew at that time?

A Well, yes, sir, they would try to cut off to where they didn't have to walk through all of that. They tried to cut off far enough back to where they could make the pickup and then walk down the pass track.

Q Is that what requires a man to ride a car on this movement, picking up cars off that pass track?

A That and the fact that you have that School Bus Road crossing there. You have to leave that open at certain times in the morning. And that requires him to ride back to a make a coupling there and inspect the brakes as he comes back forward.

Q In discussing with Mr. Taylor, that you described earlier, the conditions there around Tifton, did you ever discuss with him the ground conditions and overlying weed conditions and debris conditions?

MR. MELTON: I will have to object to the vagueness of the question.

You can answer, Mr. Davis, if you understand it.

THE WITNESS: I understand the question, and I'm not in a position to state now whether I did or didn't, because this is a problem that we are faced with over almost 10,000 miles of railroad.

And the basic fact is that the American public is just not willing to pay for us to maintain a 100-percent control of weeds over our system.

BY MR. KIKER:

Q Would this have been a business decision again relating to cost factors on upkeep of the maintenance of way?

A Well, there again, those decisions are made on a much higher level than I have yet achieved in this company. But the primary focus or the primary — let me say the item that in my view would get the first priority would be the actual maintenance of the track itself, for therein lies the greatest danger to the employees, to the equipment and to the traveling public.

And it's simply a question of economics, of how much money you have to spend.

Q Wouldn't you also be concerned with areas where the men were required to walk, specifically with respect to the weeds and grass and debris that are in those areas where the men have to walk day in and day out?

A Yes. We give some consideration to that, too. We certainly do. We operate a — basically a weedspraying outfit over the entire system every year, to my knowledge, spraying weeds along our entire right of way. We have numerous mowing machines that are engaged in mowing our right of way.

Q Do you also have men who clean up debris?

A Basically our section forces do that on a regular basis. Now, I am not saying we pick up everything, everywhere, every day.

Q You just want to clean up the major things that the forces would see or be instructed to clean up?

MR. MILTON: Let me again object. I think, again, this is out of Mr. Davis' area completely. I don't think he is competent to be questioned along this line.

But you can give an answer, Mr. Davis, if you feel like you have an answer.

THE WITNESS: Well, your question is — appears to me to be general in nature. But we certainly around our major terminals are constantly faced with the

problem of picking up pulpwood and other debris. And we do this on a regular basis. It's not as frequent as we would like to do, probably. But there again, economics is a factor in how much we are able to do.

And we certainly attempt to mow around our road crossing and our sidings and give them more attention than we do areas where normally there's not too much activity.

BY MR. KIKER:

Q Wouldn't you consider crossties lying out beside the track where the men have to walk a major item which would need to be cleaned up and policed regularly?

A There again, this depends on the location of the crosstie, how close it is to the track, and this and that and the other. We frequently place crossties along the track when we are starting up a program of tie renewal.

DEPOSITION OF WILLIAM HUCKEBA

Q And I assume, as far as the condition of weeds, that this is a matter that you have to keep up with on a regular basis?

A They will grow back.

Q And I suppose you got a lot of complaints over the years about the weeds and —

A Yes, sir, weeds will grow, and it requires a lot of work to keep them —

Q Cut down?

A — cut down and under control.

Q And when you would receive such complaints, you would handle them in the manner I think you explained before, that they were referred to the —

A We did something about it just as quickly as we could.

Q Did you have some type of a program within your supervisory personnel there to check these conditions along the railroad?

A Oh, yes, trainmasters, road foremen, roadmasters, division engineer, myself, in covering the railroad would check those conditions.

Q And if you found something that looked to be dangerous or something like that, what was your procedure?

A If we found a condition that appeared to need attention, we set about having the matter taken care of as quickly as possible.

Q How often would you make these inspections?

A Oh, a roadmaster would cover his territory weekly, or more frequently sometimes. A division engineer, every week or two. Of course, the trainmaster and road foreman, they would make frequent trips. I couldn't say to the day.

Q If they saw some kind of condition, they would come back and either report it to your office or have it handled in some type of manner; is that correct?

A Yes, that's correct.

Q And I assume these individuals would be riding the area that Train 305 covered from Albany to Tifton to Waycross and be aware of conditions along that route?

A Yes.

DEPOSITION OF EARLE WILLIAMS

Q Had this type of movement ever been discussed with representatives of the union and either yourself or Mr. Huckeba in regard to alternate methods?

A You are speaking, sir, of alternate methods of picking up from the siding at Tifton?

Q Yes.

A To the best of my knowledge, it was never discussed, brought up or considered.

Q Let me ask you this, Mr. Williams: Had anyone, either in writing or to you verbally, complained or mentioned the tall weeds that were present at the pass track and also the debris and, I believe, some tie butts and what have you there?

DEPOSITION OF JAMES SHERROD

Q Were you ever made aware of any complaints in regard to the weeds in the area of the Tifton pass track prior to the day of the accident here?

A In that particular area?

Q Yes.

A No, sir.

Q Have you ever been made aware of any complaints in regard to the use of radios and outside interference on the radios?

A No.

Q Do you ever get involved with your book of rules and the violations of various rules or the implementation of new rules?

A Are you speaking of operating rules —

Q Yes.

A — or safety rules?

exactly — I can't pinpoint the area that I looked at. I looked at the area in general there.

Q I see.

A I could possibly have looked at this area.

Q Do you know if there were any tall weeds in the area east of the main line and just south of the switch of the pass track?

A I can't remember, sir, if there was or not.

Q You don't know then whether there were any weeds there or not?

A That's correct, I don't know.

Q And the same would be true of the west side of the track; is that correct?

A That's correct, yes, sir.

PROFFER [ZADNICHICK]

BY MR. FEHNER:

Q Mr. Zadnichick, assuming that there were a large number of weeds in this area south of the pass track, and there were cut tie butts, for some considerable distance down to the south of the switch, and that, on the other side of the track there was a deep ravine dropped off the side of the track.

Now, what effect would this have on any of your movements here that required walking?

A They'd certainly be an impediment on the movement of walking.

Q Let's assume these were chest-high where it was almost impossible for a person to walk?

A Well, I wouldn't consider that a safe condition to walk under those circumstances.

Q And would it in any way affect the efficiency and safety of the movement?

A Yes.

Q If those weeks began just shortly south of this switch area, shortly south several hundred feet, would that have any more effect on the movement?

A You say they did not exist until you reached a distance some several hundred feet south of the switch?

Q No, more than that, possibly less of the switch.

A The conditions you described in a very unsatisfactory working condition, whatever the location may be.

Q What effect would that have on train handling movement in that area?

A Well, certainly it would impede the efficiency, it is not a satisfactory walking condition.

Q What about at nighttime?

A It is a hazard that is increased.

BY MR. HASTINGS:

Q Sir, I'm — is there anything — to cut down to the area where you make your cut and switch is, so that they won't have to make this 35-car ride or so down to the school bus crossing, is there anything about that area, rather than cut off at the switch, you know, to clear the switch with standing cars they cut off — why they cut off way down at that street crossing? That is, do — I am talking about in the area, weeds or anything like that?

A In other words, you are asking me why did we stop back like this?

Q That's right.

A To do our work?

Q Yes.

A South of this switch about four car lengths, three or four, the shoulders of the railroad narrows up to a standard roadbed, standard — according to this type railroad. And, there is some — it is growth down there, type grass that grows real fast, prolific, it's that Sudan grass, type of Sudan grass like.

Q Grow about waist high and thick and heavy?

A It will get up above your knees, would get waist high, yes, sometimes, but normally about a little above your knees, around your knees.

Q And from there down to the next switch is about 40 or 50 cars, I believe you stated?

A Something in the neighborhood of that, yes, sir.

Q And that is the reason you cut off back there so that people will have a clean place to walk?

A (Nods.)

Q All right, sir.

A Yes, sir.

Q Now, this grass is on both sides of the track?

A Same thing on both sides, grass.

Q Yes, sir. And is that area lighted at night?

A Well, there is a little light that comes across from these lights I was talking about, I could see across through the engine, but it wouldn't help in walking purposes.

Q And is there a lot of scrap there or metal in that area, scrap yard?

A There is a scrap yard there and we do get scrap around out of the cars and occasionally you will see a piece of scrap, you know, on the ground along there.

Q And in — in your opinion with what you have described there, would you feel that it's an unsafe place to walk?

A Well, that gets back to terminology. If a man wanted to take his time and walk carefully, it would be a safe place to walk. But, a man walking and trying to check brakes, I would have to say that it would be a hazardous walking.

Q Particularly at night, I would imagine?

A That is what I am talking about, night.

Q All right, sir. And, sir, have you personally ever requested the company to clean up that walkway so that a movement could be made without having to have a man hang on the side such as Mr. Holland?

A Yes. Yes. I — I once represented the firemen on the organization and on this district and I had an access to the superintendent on other — lots of other businesses, and the brakemen would ask me to speak to the superintendent and see if we couldn't get the grass cut down there, which I did on numerous occasions.

Q And, sir, was this in a — up to an area of the time of this accident we are talking about, this is 1973 October area?

A You mean had I spoken to the superintendent previous?

Q No. Was this condition existing in October, 1973?

A In October, '73 they had came there that year and cut the weeds with the lawnmower there that year and cut the weeds with the lawnmower — I mean, a mowing machine which cuts them about four or five inches above the ground. But, that being that warm, real warm under there, had gotten back up about something like this.

Q About this, you are referring to how many —

A About 14, 16 inches.

Q 14 to 16 inches?

A Yes, sir.

Q All right, sir.

MR. HASTINGS: I think that is all. Thank you. That is the proffer.

MR. MILTON: I have a few more questions on redirect —

THE COURT: Surely.

MR. MILTON: I am sorry, on the proffer itself you want me to ask?

THE COURT: I think you better straighten it out for the record, this may go to appellate court, they may think this occurred right at the place of the accident.

CROSS EXAMINATION (ON PROFFER)

BY MR. MILTON:

Q Mr. Thompson, is the area that you have just been asked questions about by Mr. Hastings, is this anywhere in the area where your move was progressing at the time of Mr. Holland's accident?

A No, sir. This area I discussed with Mr. Hastings just previous to this was in the area south of the engine after the coupling was made.

Q In other words, it would be considerably south of, say, school bus crossing or the south pass track itself?

A Approximately three to four cars past the south pass track switch, is where it starts.

Q And the walking area from the school bus crossing to the south pass track is a good clean walking area?

A That's right.

MR. MILTON: That is all I have.

MR. HASTINGS: One last question, I apologize.

REDIRECT EXAMINATION (ON PROFFER)

BY MR. HASTINGS:

Q So, sir, if you didn't pull out, for example, with your 39 cars here going forward, before you started shov-

ing back, and if a man had to walk to the head end, he would have to be walking through this region that we have described that is south of the —

A Had I left my —

Q Switch.

A Had I left the train at the — in the vicinity of the derailer you are talking about, and pulled the train down in the clear?

Q Right.

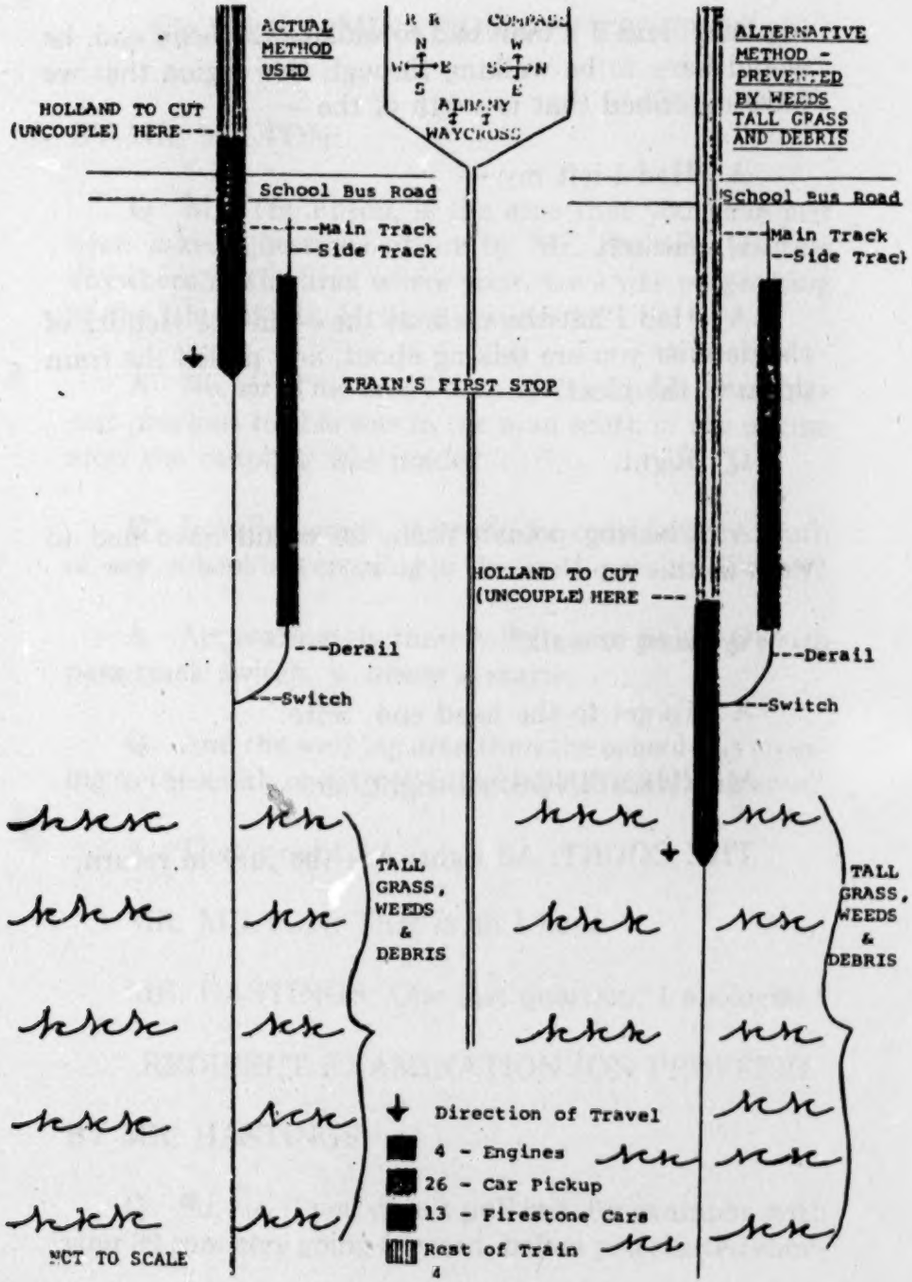
A Clearing point? Yeah, he would have had to walk in this area.

Q Had to walk?

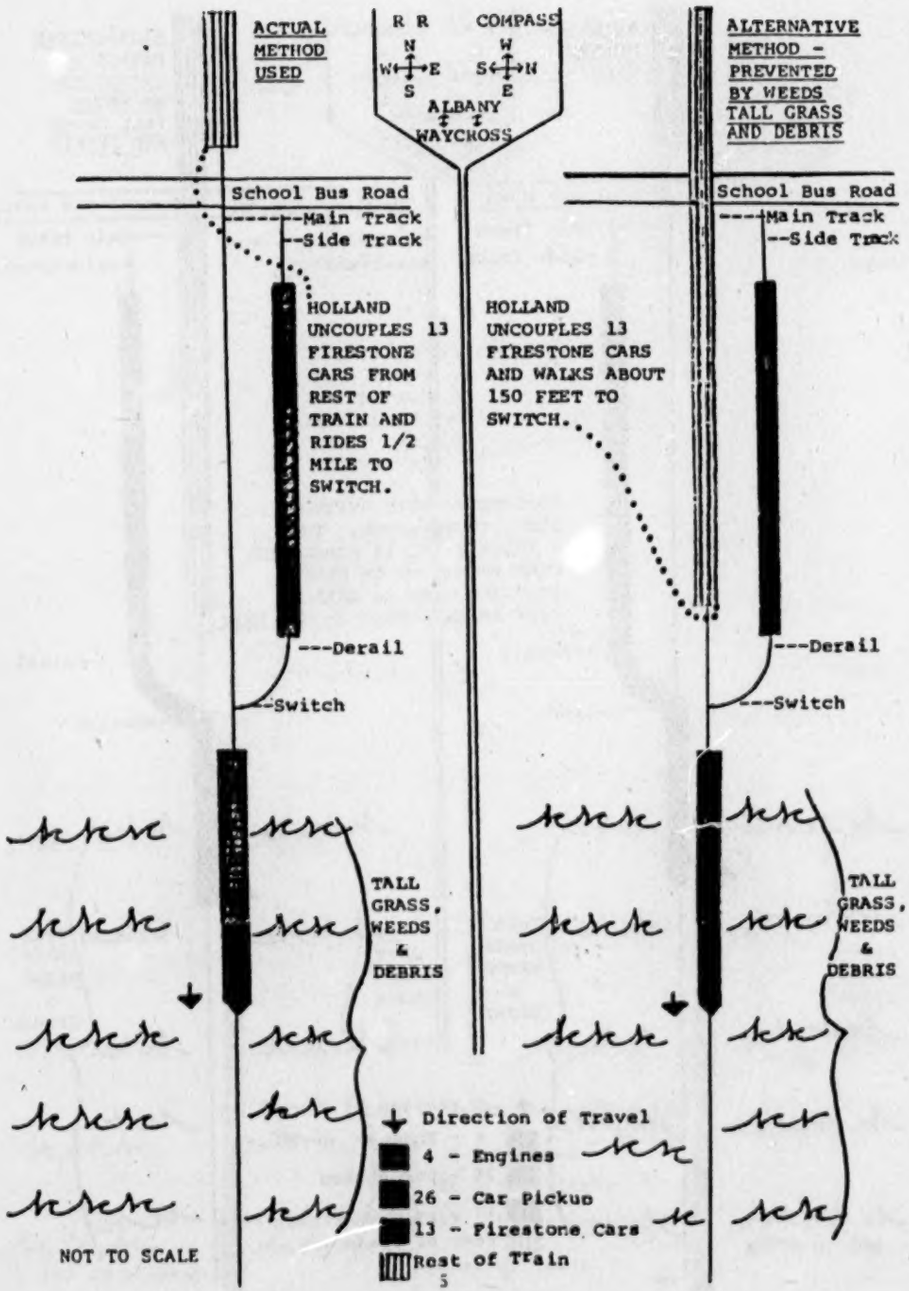
A To get to the head end. Sure.

MR. HASTINGS: All right, sir.

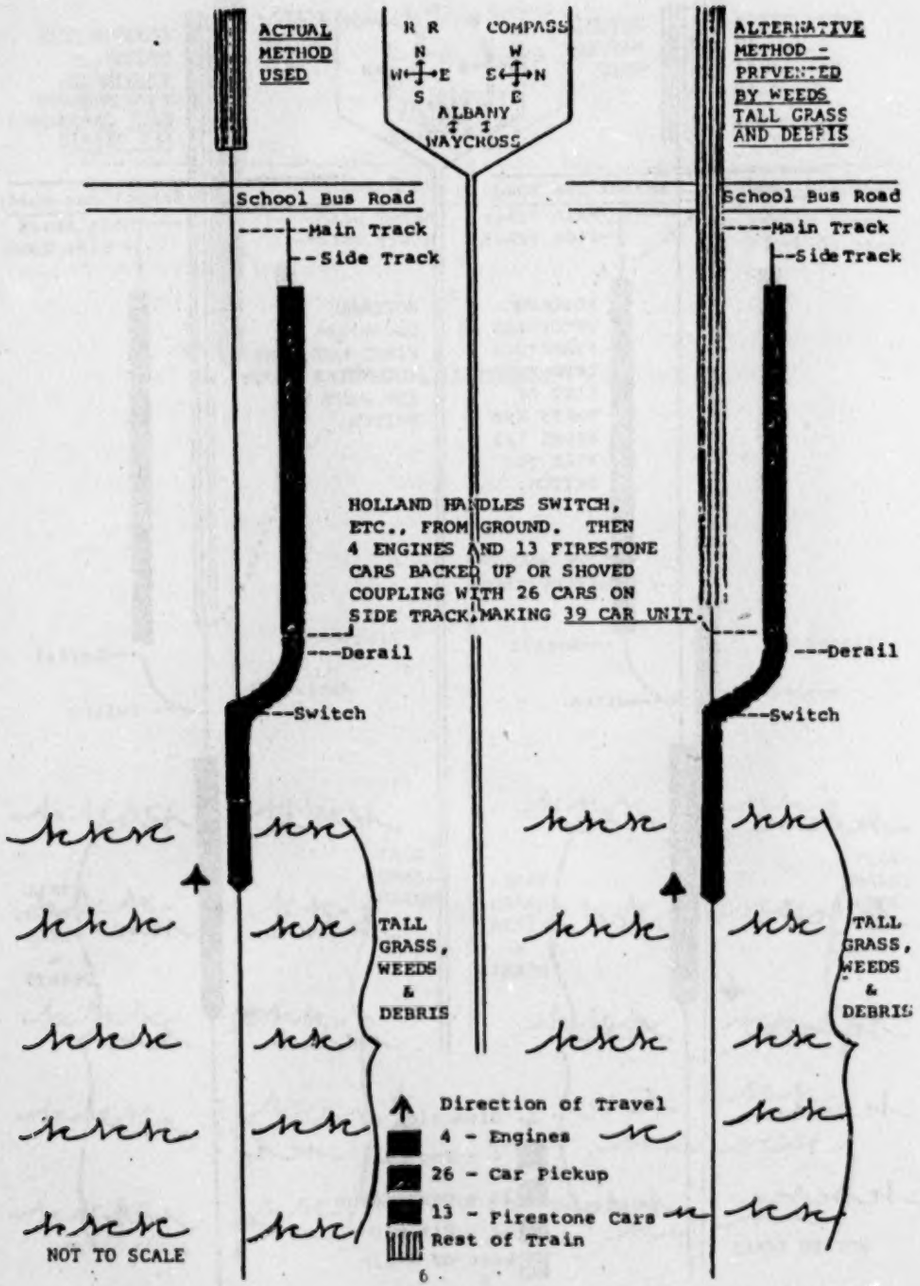
THE COURT: All right. Ask the jury to return.


ACTUAL METHOD USED
R R COMPASS
N W
W E S N
S E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
HOLLAND TO CUT (UNCOUPLE) HERE---
School Bus Road
Main Track
Side Track
TRAIN'S FIRST STOP
HOLLAND TO CUT (UNCOUPLE) HERE ---
Derail
Switch
TALL GRASS, WEEDS & DEBRIS
Direction of Travel
4 - Engines
26 - Car Pickup
13 - Firestone Cars
Rest of Train
NOT TO SCALE

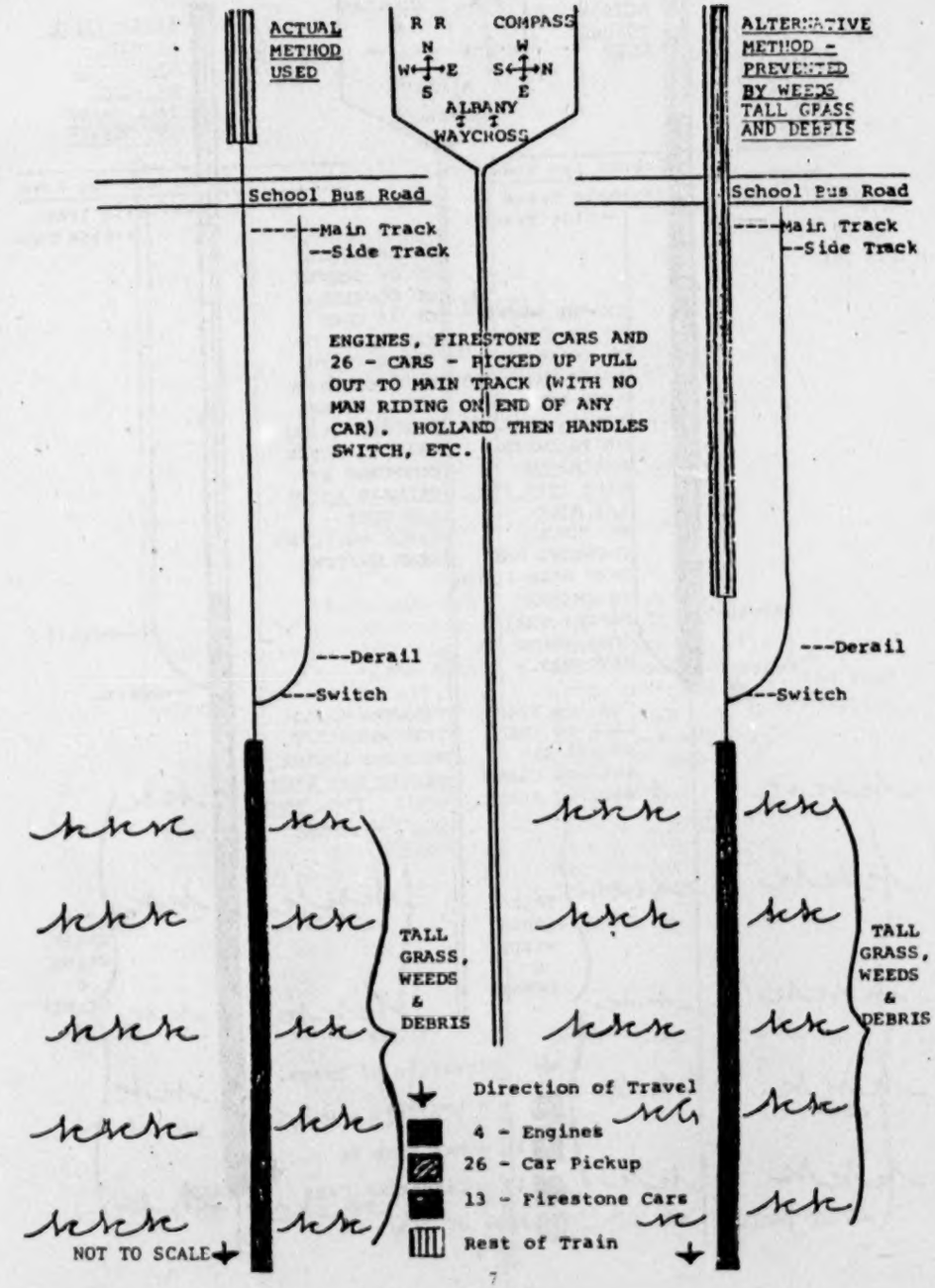
App. 36


ACTUAL METHOD USED
R R COMPASS
N W
W E S N
S E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
School Bus Road
Main Track
Side Track
HOLLAND UNCOUPLES 13 FIRESTONE CARS FROM REST OF TRAIN AND RIDES 1/2 MILE TO SWITCH.
HOLLAND UNCOUPLES 13 FIRESTONE CARS AND WALKS ABOUT 150 FEET TO SWITCH.
Derail
Switch
TALL GRASS, WEEDS & DEBRIS
Direction of Travel
4 - Engines
26 - Car Pickup
13 - Firestone Cars
Rest of Train
NOT TO SCALE

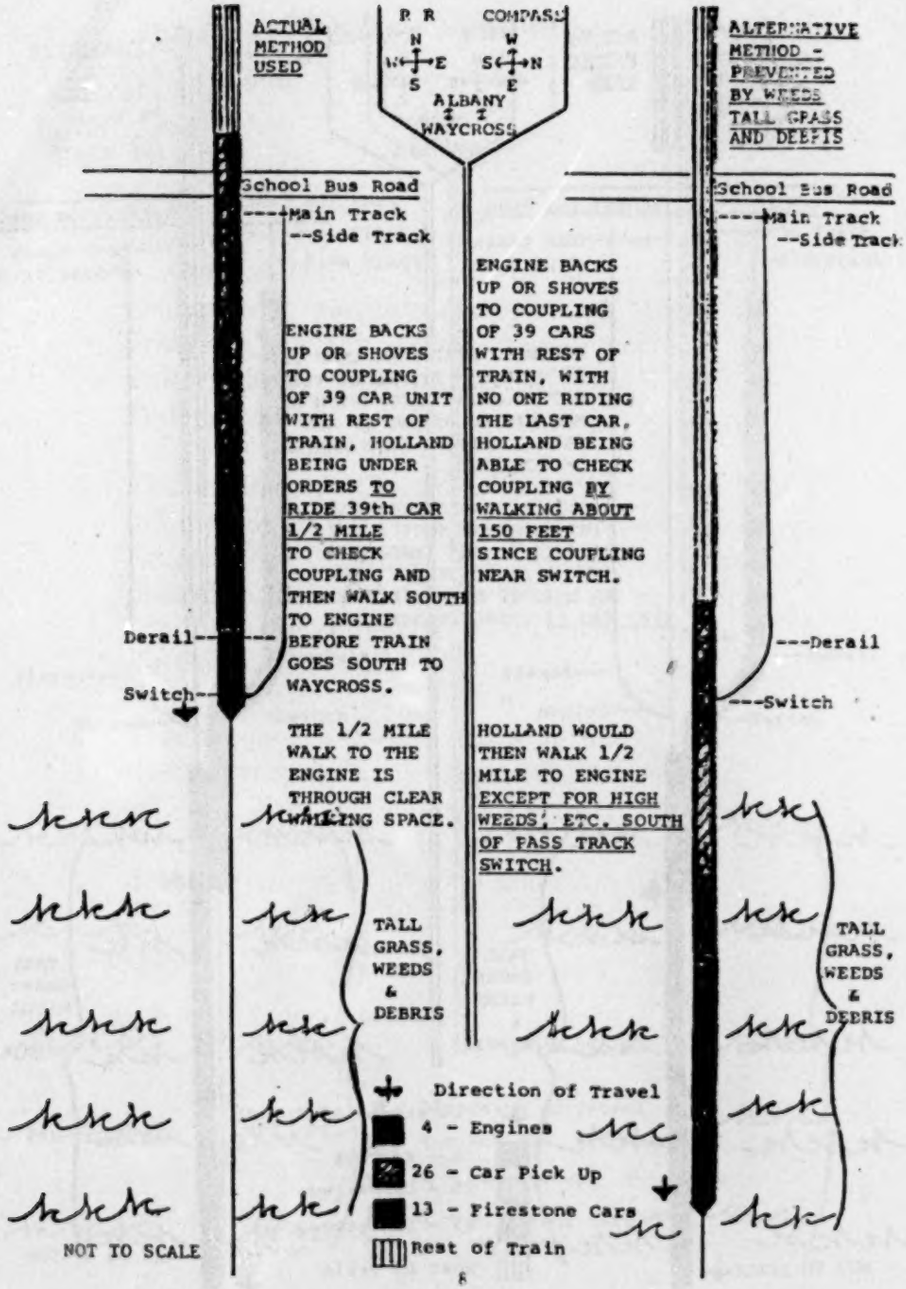
App. 37


ACTUAL METHOD USED
R R
COMPASS
N
W
E
S
S
N
E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
School Bus Road
Main Track
Side Track
HOLLAND HANDLES SWITCH, ETC., FROM GROUND. THEN 4 ENGINES AND 13 FIRESTONE CARS BACKED UP OR SHOVED COUPLING WITH 26 CARS ON SIDE TRACK, MAKING 39 CAR UNIT.
Derail
Switch
TALL GRASS, WEEDS & DEBRIS
Direction of Travel
4 - Engines
26 - Car Pickup
13 - Firestone Cars
Rest of Train
NOT TO SCALE

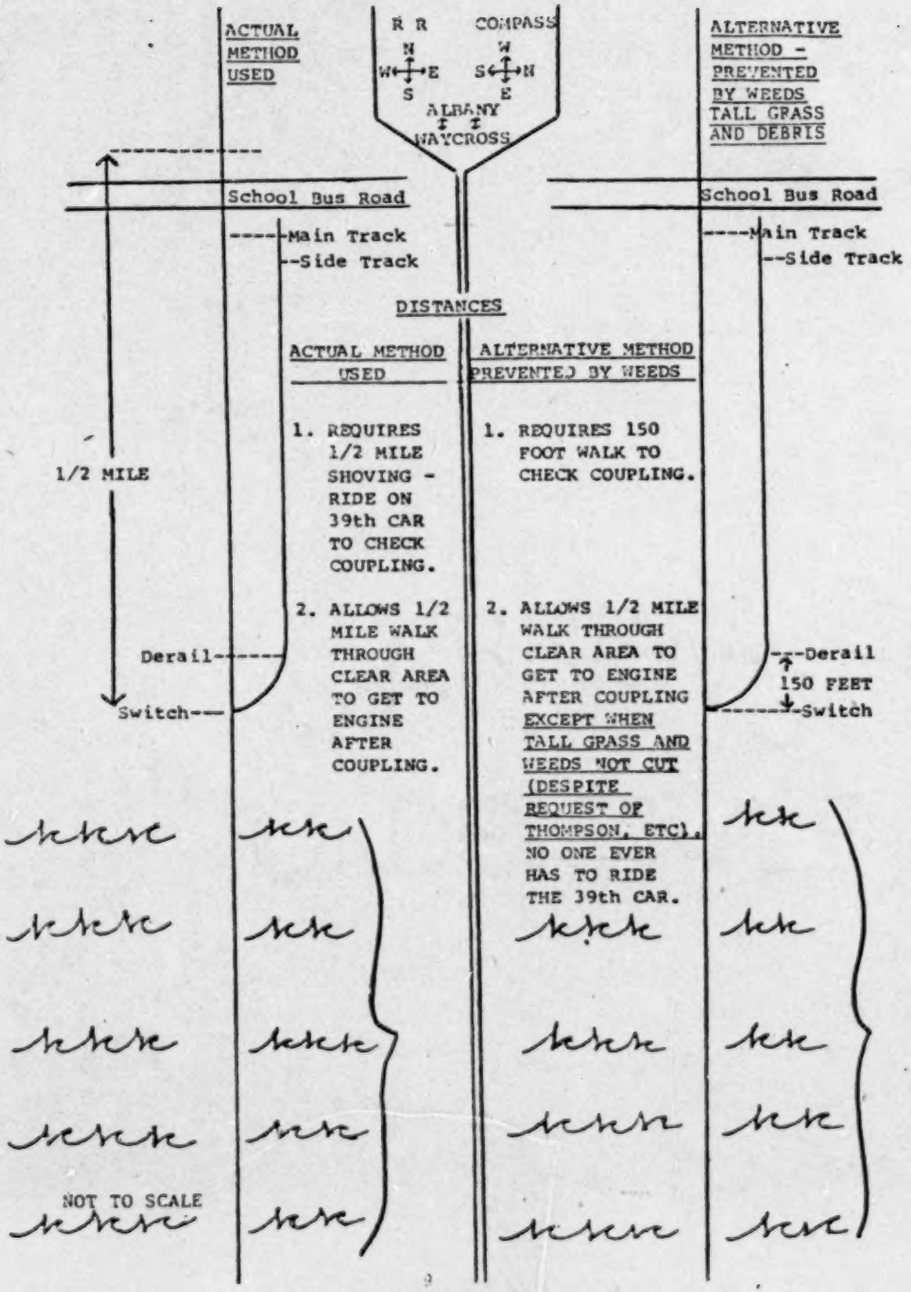
App. 38


ACTUAL METHOD USED
R R
COMPASS
N
W
E
S
S
N
E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
School Bus Road
Main Track
Side Track
ENGINES, FIRESTONE CARS AND 26 - CARS - PICKED UP PULL OUT TO MAIN TRACK (WITH NO MAN RIDING ON END OF ANY CAR). HOLLAND THEN HANDLES SWITCH, ETC.
Derail
Switch
TALL GRASS, WEEDS & DEBRIS
Direction of Travel
4 - Engines
26 - Car Pickup
13 - Firestone Cars
Rest of Train
NOT TO SCALE

App. 39


ACTUAL METHOD USED
R R
N
W E
S
COMPASS
W
S N
E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
School Bus Road
Main Track
Side Track
ENGINE BACKS UP OR SHOVES TO COUPLING OF 39 CAR UNIT WITH REST OF TRAIN, HOLLAND BEING UNDER ORDERS TO RIDE 39th CAR 1/2 MILE TO CHECK COUPLING AND THEN WALK SOUTH TO ENGINE BEFORE TRAIN GOES SOUTH TO WAYCROSS.
THE 1/2 MILE WALK TO THE ENGINE IS THROUGH CLEAR WALKING SPACE.
ENGINE BACKS UP OR SHOVES TO COUPLING OF 39 CARS WITH REST OF TRAIN, WITH NO ONE RIDING THE LAST CAR, HOLLAND BEING ABLE TO CHECK COUPLING BY WALKING ABOUT 150 FEET SINCE COUPLING NEAR SWITCH.
HOLLAND WOULD THEN WALK 1/2 MILE TO ENGINE EXCEPT FOR HIGH WEEDS, ETC. SOUTH OF PASS TRACK SWITCH.
Derail
Switch
TALL GRASS, WEEDS & DEBRIS
Direction of Travel
4 - Engines
26 - Car Pick Up
13 - Firestone Cars
Rest of Train
NOT TO SCALE

App. 40


ACTUAL METHOD USED
R R
N
W E
S
COMPASS
W
S N
E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
School Bus Road
Main Track
Side Track
1/2 MILE
DISTANCES
ACTUAL METHOD USED
ALTERNATIVE METHOD PREVENTED BY WEEDS
1. REQUIRES 1/2 MILE SHOVING - RIDE ON 39th CAR TO CHECK COUPLING.
2. ALLOWS 1/2 MILE WALK THROUGH CLEAR AREA TO GET TO ENGINE AFTER COUPLING.
1. REQUIRES 150 FOOT WALK TO CHECK COUPLING.
2. ALLOWS 1/2 MILE WALK THROUGH CLEAR AREA TO GET TO ENGINE AFTER COUPLING EXCEPT WHEN TALL GRASS AND WEEDS NOT CUT (DESPITE REQUEST OF THOMPSON, ETC), NO ONE EVER HAS TO RIDE THE 39th CAR.
Derail
Switch
150 FEET
NOT TO SCALE

App. 41

Supreme Court, U. S.
FILED
MAR 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1164

BOBBY WADE HOLLAND,
Petitioner,

versus

SEABOARD COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH P. MILTON, ESQUIRE
Howell, Howell, Liles,
Braddock & Milton
901 Blackstone Building
Jacksonville, Florida 32202
904/632-2200
Counsel for Respondent

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1811

INDEX

Page

OPINION BELOW 2

JURISDICTION 3

QUESTIONS PRESENTED 3

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 9

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED 15

1. FIRST THREE REASONS STATED BY PETITIONER AS TO WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED WERE NEVER APPROPRIATELY RAISED IN THE STATE TRIAL COURT OR STATE APPELLATE COURT LEVEL AND THEREFORE SHOULD NOT BE CONSIDERED 15

2. NO CONFLICT WITH DECISIONS OF THIS COURT AND, IN FACT, EVEN IF FIRST THREE QUESTIONS PRESENTED IN PETITIONER'S BRIEF ARE CONSIDERED, THE MATTER HAS PREVIOUSLY BEEN DECIDED BY THIS COURT ADVERSELY TO PETITIONER 17

INDEX (Continued)

Page

3. TRIAL COURT PROPERLY CHARGED JURY IN THIS FEDERAL EMPLOYERS LIABILITY ACT CASE 25

CONCLUSION 32

CERTIFICATE OF SERVICE 33

APPENDIX

Excerpt from Pre-Trial Conference 1a

Plaintiff's Motion for New Trial 3a

Issues Presented by Plaintiff to the District Court of Appeal of Florida, First District ...16a

Issues Presented by Plaintiff on Jurisdiction to the Supreme Court of Florida 17a

TABLE OF AUTHORITIES

Cases

Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 24

Atlantic Coast Line Railroad Co. v. Mims, 37 S.Ct. 188 (1917) 22,24

Bertrand v. Southern Pacific Co., 282 F.2d 569 (9th Cir. 1960) 26

Ely v. Reading Co., 424 F.2d 758 (3rd Cir. 1970) 26

TABLE OF AUTHORITIES (Continued)

Page

Funseth v. Great Northern Railway Co., 399 F.2d 918, (9th Cir. 1968), cert. den. 393 U.S. 1083 26

Harris v. Pennsylvania Railroad Co., 80 S.Ct. 22 21

Idzojtic v. Pennsylvania Railroad Co., 431 F.2d 1029 (3rd Cir. 1970) 25

Oxley Stave Co. v. Butler County, 166 U.S. 648 16

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S.Ct. 443 (1957) 25,26,29,30

Spinks v. Chevron Oil Co., 507 F.2d 216, (5th Cir. 1975) 30

Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018 (1949) 30

Statutes

45 U.S.C. §22 9

45 U.S.C. §51, et seq. 9,30

28 U.S.C. §1257(3) 3,5,16

Florida Statute §59.041 (1975) 8

Rules of Procedure

Federal Rule of Civil Procedure 15(a) and (b) . . 7,8,17

Federal Rule of Civil Procedure 61 8,9

TABLE OF AUTHORITIES (Continued)

Page

Florida Rule of Civil Procedure 1.190(a) and (b) 5,6,17

Other

3 Devitt & Blackmar, Federal Jury Practice and Instruction, §94.13 (3rd ed. 1977) 30

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1164

BOBBY WADE HOLLAND,
Petitioner,

versus

SEABOARD COAST LINE
RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, SEABOARD COAST LINE RAILROAD COMPANY, opposes the Petition for a Writ of Certiorari filed before this Court by Petitioner. Hereafter the Petitioner will be referred to as HOLLAND, and Respondent will be referred to as SCL. References to the Appendix filed by Petitioner will be (P.A. ____), and references to the Appendix attached to this brief will be (R.A. ____).

OPINION BELOW

The initial finding in favor of SCL was a verdict returned by the jury following a lengthy trial and after they were properly charged on the applicable law under the Plaintiff's theories of liability brought pursuant to the Federal Employers Liability Act, the Safety Appliance Act, the Boiler Inspection Act and the Power Brake Law. Thereafter, the Plaintiff filed a Motion for New Trial listing twenty-eight (28) reasons why the trial court should set aside the jury's verdict in this FELA action (R.A. 3a-15a). Following oral arguments on the motion, the trial court denied Plaintiff's Motion for New Trial (P.A. 13-19).

HOLLAND then filed an appeal with the District Court of Appeal of Florida, First District, raising four issues, none of which involved the first three questions presented to this Court by their Petition for a Writ of Certiorari (R.A. 16a-17a). Following oral argument, the District Court of Appeal of Florida, First District, issued their Opinion (P.A. 1-7), affirming the jury verdict and the trial court's denial of HOLLAND'S Motion for New Trial. Thereafter, a timely Petition for Rehearing as well as a Suggestion for Certification was denied without Opinion by the District Court of Appeal of Florida, First District, on January 12, 1978. A Petition for a Writ of Certiorari to the Supreme Court of Florida was filed and denied without Opinion on May 17, 1978; a timely Petition for Rehearing filed by HOLLAND in the Supreme Court of Florida was denied without Opinion on August 28, 1978.

JURISDICTION

Petitioner attempts to invoke this Court's jurisdiction to review the questions presented in their Petition under 28 U.S.C. §1257(3). Respondent challenges the contention of Petitioner that this is a case which is a proper matter for review by a Writ of Certiorari. This case does not question the validity of a treaty or statute of the United States nor is the validity of a state statute drawn in question as being repugnant to the Constitution, treaties or laws of the United States. This is particularly true where three of the four questions presented in the Petition were never properly raised in the state trial or appellate courts. There is not any conflict between the decision below and any prior decisions of this Court; in fact, prior decisions of this Court are completely and totally consistent with the result reached below. Therefore, Respondent respectfully submits that this case does not present a proper matter for review by this Court by a Writ of Certiorari and the Petition should be denied.

QUESTIONS PRESENTED

Respondent takes issue with the four questions presented by Petitioner. Questions 1, 2 and 3 of Petitioner's brief have never been properly presented or raised in the state court and for that reason only question 4 is properly before this Court. Therefore, the questions actually presented are as follows:

1. Should this Court accept jurisdiction to consider matters not preserved nor presented in the state courts below?

2. Even assuming questions 1 through 3 of Petitioner's brief had been properly presented and preserved in the state courts below, should this Court accept jurisdiction on a case where there is no conflict with decisions of this Court and the points involved have been previously decided by this Court adversely to Petitioner?

a. Florida's rules of pleading and practice are totally consistent with federal rules of pleading and practice and impose no limitation of the rights granted under the Federal Employers Liability Act.

b. Petitioner was granted leave to amend Complaint numerous times and in fact no Motion to Amend was ever denied and Plaintiff submitted numerous theories of liability to a jury which decided the case adverse to Petitioner; Petitioner was not deprived of any right to jury trial, but in fact had a jury trial.

3. Should this Court accept jurisdiction in a case where the trial court correctly charged the jury, consistent with decisions of this Court, on legal causation under the Federal Employers Liability Act?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 28 U.S.C. §1257(3) provides in relevant part:

"State courts; appeal; certiorari
Final Judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) by writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States, or
* * *"

2. Florida Rule of Civil Procedure 1.190 (a) and (b) provides as follows:

"(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party and leave shall be given freely when justice so requires. A Party

shall plead in response to an amended pleading within twenty days after service of the amended pleading unless the court otherwise orders; provided that if a motion or pleading has been served in response to a prior pleading and a party does not plead or move in response to the amended pleading, the original response shall be considered as pleaded to the amended pleading.

(b) Amendments to Conform with the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure to so amend shall not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice him in maintaining his action or defense upon the merits."

3. Federal Rule of Civil Procedure 15(a) and (b) states as follows:

> "(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.
>
> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these

issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

4. Florida Statute §59.041 (1975):

"No judgment shall be set aside or reversed, or new trial granted by any Court of the State in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the Court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This Section shall be liberally construed."

5. Federal Rule of Civil Procedure 61:

"HARMLESS ERROR. No error in either the admission or the exclusion of evidence and no

error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF THE CASE

1. Proceedings Below

HOLLAND filed his Complaint against SCL on November 19, 1974, for damages pursuant to the Federal Employers Liability Act, 45 U.S.C. §51, and the Boiler Inspection Act, 45 U.S.C. §22. Thereafter, HOLLAND filed an Amended Complaint which set forth eleven specific allegations concerning the alleged negligence pursuant to the FELA as well as containing a second count under the Plaintiff's allegations concerning the Boiler Inspection Act (P.A. 7-13).

On October 10, 1975, HOLLAND filed yet another Motion to Amend the Amended Complaint and on October 15, 1975, he filed still another Motion to Amend the Amended Complaint. As was the case in every instance where HOLLAND moved to amend the plead-

ings, the Motion was granted. In the numerous amendments to the original Complaint only one additional allegation of negligence (apart from the original eleven allegations) was added by the Plaintiff which read as follows:

> "(1) In negligently instructing and/or directing the train crew to pick up cars on the pass track in a manner and method as was known by the Defendant to be hazardous when there was a safer alternative method of accomplishing the same objective."

During the various amendments to the original Complaint, a third count was also added alleging violations of the Safety Appliance Act.

During the pre-trial conference Plaintiff's counsel amplified what was meant by the twelfth allegation under the FELA count of Plaintiff's Complaint, by stating that when making a pickup of cars in Tifton, Georgia some original cars of the train were held onto by the engine and that this practice constituted an allegedly hazardous method of making the pickup. There was never any mention made of weeds in some other area as has been the case ever since the jury verdict (R.A. 1a-2a). The excerpt from the pre-trial conference included in Petitioner's brief (P.A. 20) is totally out of context and misleading and is not addressed to the issues Petitioner attempts to attribute to those comments.

The trial began on December 1, 1975 and concluded with a unanimous jury verdict in favor of SCL on December 12, 1975. At no time during (or after) the trial did Plaintiff make a Motion to further amend his previously often-amended Complaint, even though Florida Rule of Civil Procedure 1.190 permits it. Plaintiff later filed a lengthy Motion for New Trial (R.A. 3a-15a), which raised none of the matters set forth in Petitioner's first three questions presented to this Court; after argument on the Motion, the trial court denied Plaintiff's Motion for New Trial with a very detailed and learned opinion (P.A. 13-19).

The Plaintiff thereafter appealed to the District Court of Appeal of Florida, First District, raising primarily four issues (R.A. 16a-17a), none of which included the first three questions presented to this Court in the Petition, and the District Court of Appeal affirmed the judgment (P.A. 1-7). HOLLAND then filed a Petition for Writ of Certiorari to the Supreme Court of Florida, which again failed to raise any of the first three questions presented to this Court (R.A. 17a-18a) and their Petition for Writ of Certiorari was denied without Opinion by the Supreme Court of Florida. Thereafter, HOLLAND'S Petition for Rehearing was also denied without Opinion by the Supreme Court of Florida.

2. The Facts Shown At Trial.

Since HOLLAND'S brief includes many matters which in fact were not shown at trial, nor were they proffered at trial, SCL finds it necessary to restate the

facts as well as point out matters which were included in HOLLAND'S Appendix which should not be considered by this Court as they are not part of the Record on Appeal.

The facts brought forth during the trial of this case established that HOLLAND was the brakeman on Train 305, a freight train which ran from Albany, Georgia to Waycross, Georgia, and en route would make several setoffs and pickups of other railroad cars. One of the standard places to pick up additional cars was in the town of Tifton, Georgia. The method utilized on the night of HOLLAND'S accident in Tifton was the same method that had been utilized, without incident, seven days a week, 52 weeks a year, for over 18 years and was in fact the same method used by HOLLAND himself hundreds of times. The engineer of HOLLAND'S crew had used this method since 1947 and had never had complaints from brakemen concerning either the move or his handling of the train during that type of move. HOLLAND, having worked the job hundreds of times, was not only very familiar with the move, but had never complained to anyone concerning the way the move was carried out.

As previously set forth in the Statement of the Case, HOLLAND had numerous theories of negligence under the FELA as well as numerous allegations of violations of the Safety Appliance Act, Boiler Inspection Act and Power Brake Law, all of which allegedly contributed to Plaintiff's accident.

None of the twelve allegations of negligence under the FELA count of HOLLAND'S often-amended Complaint stated that due to some alleged weeds in some area not connected with HOLLAND'S accident that he was required to do the job in the manner in which it was done on the evening of his accident! In fact, the only allegation concerning the method which was used was the twelfth allegation which stated that SCL negligently directed the crew to pick up the cars in Tifton, Georgia by a hazardous method (a contention which was unanimously decided adverse to Plaintiff by the jury), when *there was a safer alternative method* of accomplishing the same objective (it *was not* alleged that *there should have been a safer alternative* of accomplishing the same objective, *but for some negligently maintained condition*). As the trial court's Order denying Plaintiff's Motion for New Trial (P.A. 14-17) so acutely points out, the "weed theory" has been a total afterthought when trying to analyze why the jury's unanimous verdict was adverse to them. In fact, HOLLAND'S attorneys at no point during the trial moved the court to amend their Complaint to include any allegation which has been so strenuously urged as a theory ever since the adverse verdict.

HOLLAND'S Statement of the Case makes reference to the fact that during discovery, prior to the trial, inquiry was made of several persons concerning the area south of the pass track in Tifton, Georgia. Suffice it to say that voluminous discovery was undertaken prior to trial, some of which clearly went into irrelevant, immaterial matters such as the area south of

the pass track switch in Tifton. It should be noted that the following portions of HOLLAND'S Appendix should be completely disregarded by this Court as they were not even proffered at the trial and in no way constitute a portion of the Record in this case, i.e., the first four questions and answers from the deposition of William Huckeba (P.A. 24-25); all of the excerpts from deposition of Earl Williams (P.A. 26); all of the excerpts of deposition of Shirley Davis (P.A. 22-24). Additionally, the self-serving "diagrams" (P.A. 36-41) were also never proffered nor was anything similar ever even attempted to be introduced into evidence at the trial and should not be considered.

The trial court did allow the Plaintiff's expert, Mr. Zadnichick, to testify that in his opinion the method used to pick up the cars was not reasonably safe and that there were four alternatives which could (and in his opinion should) have been utilized on the evening of HOLLAND'S accident. Thus, the jury had before it for consideration, and were properly charged by the court that they could consider, alternative methods in determining whether or not the method used was reasonably safe under the circumstances.

In addition to the above, it is also noteworthy that there was not one shred of evidence, proffered or otherwise, to indicate that the method used to pick up the railroad cars in Tifton, Georgia on the night of HOLLAND'S accident would have been done any differently that night, irregardless of the condition of

any other area in Tifton, Georgia. In fact, the undisputed evidence was that the method used that night was the very same method that had been used thousands of times without any incidents or problems over a span of years.

As in any trial, there were many contradictions in the evidence concerning the train handling, radio interference or lack of interference, as well as numerous other issues. It is obvious from the jury's verdict, after being properly charged on the law, that they resolved the conflicts in the testimony adversely to HOLLAND.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1. The First Three Reasons Stated By Petitioner As To Why The Petition For A Writ Of Certiorari Should Be Granted Were Never Appropriately Raised In The State Trial Court Or State Appellate Court Level And Therefore Should Not Be Considered.

As clearly shown in Plaintiff's Motion for New Trial (R.A. 3a-15a) and by the issues presented to the District Court of Appeal of Florida, First District, (R.A. 16a-17a) and in the issues involved on jurisdiction presented in the Petition for a Writ of Certiorari to the Supreme Court of Florida (R.A. 17a-18a), HOLLAND never raised the first three questions presented to this Court as reasons for granting the Writ.

HOLLAND now seeks to present as questions presented and reasons for granting the Writ, first, that "restrictive local pleading rules" of the State of Florida defeats a federal right of recovery under the Federal Employers Liability Act (Petitioner's questions 1 and 2), and that exclusion of proof constitutes a deprivation of a right to a jury trial under the Seventh Amendment to the Constitution of the United States (Petitioner's question 3). It has always been deemed to be essential to the jurisdiction of this Honorable Court under 28 U.S.C. §1257(3) that a substantial federal question has been properly raised in the state court proceedings. As stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655:

> "* * * the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

Here, the questions now presented to this Court have never been raised at the trial court level or the appellate court level, but have in fact been raised for the first time in this Court. This deficiency in and of itself is an adequate and compelling reason to deny Petitioner's Writ for Certiorari.

2. No Conflict With Decisions Of This Court And, In Fact, Even If First Three Questions Presented In Petitioner's Brief Are Considered, The Matter Has Previously Been Decided By This Court Adversely To Petitioner.

Incredibly, HOLLAND refers to the Florida Rules of Pleading as "restrictive", "stringent" and in conflict with "liberal federal notice pleading". How this contention can be made in the face of the Record of this case is astounding.

Florida Rule of Civil Procedure 1.190 is virtually identical to Federal Rule of Civil Procedure 15(a) and (b), both of which freely grant leave to amend the pleadings. In this case, as has already been set forth, the Plaintiff filed numerous motions to amend their original Complaint, all of which were granted. However, the Plaintiff never moved the court for permission to amend their pleadings at any point during the trial, which procedure was readily available to them. By analogy, one would suppose that HOLLAND would also characterize the Federal rules concerning pleading to be "restrictive", "stringent" and "not liberal enough".

While the first three questions presented in Petitioner's brief are all basically the same, Petitioner has treated them in separate categories of the brief. In an effort to simplify the reply, this section of SCL's brief will address all of the points covered under the first three questions of HOLLAND'S brief.

First, HOLLAND'S common theme throughout their first three questions presented center upon their contention that they were prohibited from presenting evidence of a safer alternative method than that which was actually used at the time of his injury. *This is simply not the case!* The trial court allowed HOLLAND to put in evidence of alternative methods through their expert witness, Mr. Zadnichick, who testified as to four alternative methods which, in his opinion, should have been utilized. Zadnichick's fourth alternative method would have involved a brakeman (such as HOLLAND) walking in the area which HOLLAND now alleges to have had weeds. Zadnichick further testified that his fourth alternative was the least efficient of all the alternatives. *The trial court excluded evidence of weeds, not evidence of alternative methods,* which encompassed the very same points HOLLAND continues to complain about. Not only was the Plaintiff permitted to put in evidence of all potential alternatives, but the trial court also charged the jury in its jury charge of 2,741 words as follows:

> "In determining whether or not the Defendant railroad failed to provide the Plaintiff with a reasonably safe place to work, a reasonably safe method of work, and reasonably safe tools and equipment, you may consider the presence or absence of available alternatives."

Thus, the jury in this case had before it evidence of all potential alternative methods for consideration as to

whether or not the method actually used was one which was reasonably safe. The representations made in HOLLAND'S brief are misleading in that they are an attempt to have this Court believe that the jury was permitted to consider only the train movement being utilized at the time of HOLLAND'S injury and was precluded from considering all other alternatives. HOLLAND has continually referred to the exclusion of the alleged weeds as excluding his "theory" from evidence. The fact of the matter is the trial court simply refused to allow evidence of weeds in an area remote from that in which the actual train movement was being conducted at the time of Petitioner's injury. There was no evidence whatsoever that the movement being done at the time of HOLLAND'S injury was done in that manner because of weeds. Also, Petitioner was clearly allowed to present evidence of every possible alternative method of making the movement, including the one that would have involved the Petitioner walking in the area south of the pass track.

Also, as clearly demonstrated by the Record, HOLLAND'S argument concerning "alleged weeds" is totally inconsistent with his pleaded theory that SCL was liable, "(1) in negligently instructing and/or directing the train crew to pick up cars on the pass track in a manner and method as was known by the Defendant to be hazardous when there was a safer alternative method of accomplishing the same objective."

There was no evidence that SCL knew the movement to be hazardous; in fact, it had consistently been safely done

that way for years. As the District Court of Appeal of Florida, First District, observed, HOLLAND'S assertion is completely inconsistent with the pleaded theories of negligence. There was simply no relationship between "alleged weeds" and this accident.

To again attempt to set the record straight concerning reality and fantasy, it is necessary to respond to HOLLAND'S representation that at the pre-trial conference prior to the trial, HOLLAND'S counsel apprised everyone of the "weed theory". Keeping in mind that the undisputed evidence, from even HOLLAND himself, established that the particular area where the move was taking place at the time of HOLLAND'S accident provided an excellent walking area which was free of any vegetation, debris, etc., the following demonstrates that HOLLAND'S lead trial counsel was not adequately familiar with the facts at that juncture (P.A. 20):

> "MR. HASTINGS: Your Honor, so you understand what we are talking about, because this is a factual situation, what it is in essence *in this particular area where this movement is taking place, there are high weeds, we are alleging, and there is a lot of debris.* * * * " (emphasis supplied)

The cases cited by HOLLAND under the first three questions presented are clearly not supportive of their

position. Virtually every case cited in HOLLAND'S brief involve situations where the lower court withheld the case from the jury or set aside a jury verdict for the employee and ordered a new trial or, in fact, reversed a jury verdict in favor of the employee. See *Harris v. Pennsylvania Railroad Co.*, 80 S.Ct. 22, 23-26. If anything, the cases cited in HOLLAND'S brief are in support of the reasons why the Writ of Certiorari should be denied, in that the jury in this case considered not only whether the method being utilized at the time of HOLLAND'S accident, which was the same method which had been utilized for years, was reasonably safe, but also was allowed to consider *all* conceivable alternative methods, and after considering all methods, found for SCL. Thus, it is clear that a jury verdict in an FELA case should not be disturbed by an appellate court which is exactly what HOLLAND is urging this Court to do.

Even if we assume that the facts in this case were such that the Plaintiff was precluded from putting on evidence of alternative methods of accomplishing the move (which is, of course, completely opposite from the facts of this case) and was allowed to only put on evidence concerning the actual move being made at the time of the accident, and then we consider the actual fact that HOLLAND'S attorney never moved to amend the pleadings during trial, then the issue has already

been determined in this Court adversely to HOLLAND.

In *Atlantic Coast Line Railroad Co. v. Mims*, 37 S.Ct. 188 (1917), the Defendant railroad attempted to introduce evidence establishing facts which would enable them to assert FELA defenses. The trial court rejected the proffered evidence, holding that it came too late and was not relevant to any issue tendered by the pleadings in the case. The Defendant did not move for leave to amend the Answer, as permitted by the pleading rules of South Carolina. By excluding the testimony, the trial court effectively precluded the Defendant from asserting a defense available under the Federal Employers Liability Act. The Supreme Court of South Carolina affirmed the trial court. This Court held that the railroad's failure to properly raise and present the claim pursuant to the state's system of pleading precluded review of the case by this Court. As stated by Justice Clarke at page 189:

> "This epitome of the action of the state court shows that the claim under the federal statute now made was not presented until after the Plaintiff had rested in the second trial of the case after it had been to the supreme court, and after the Defendant, upon the opening of this second trial, had amended its answer by adding a third defense, without mentioning or

in any manner attempting to plead the Federal claim. Even at this stage of the trial the assertion of the claim consisted only in a tender of testimony, without any application to amend the answer.

To become the basis of a proceeding in error from this court to the Supreme Court of a state 'a right, privilege, or immunity' claimed under a statute of the United States must be 'specially set up and claimed,' and must be denied by the state court. (cite omitted) This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice. (cites omitted) * * *."

At page 190.

"While it is true that a substantive Federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the Plaintiff in error to a Federal right not having been asserted at a time and in a manner calling for the consideration of it by the state supreme court under its established system of practice and pleading, the refusal of the trial court and of the supreme court to admit the testimony tendered in support of such claim is not a denial of a Federal right which this court can

review (cites omitted), and therefore, for want of jurisdiction, the writ of error is dismissed."

On page 20 of HOLLAND'S brief there appears a footnote wherein the admission is made that the pleading should have been amended to conform with the attempted proof. The Florida Rules of Civil Procedure, as previously noted, are vitually identical to the Federal Rules of Civil Procedure concerning amendments to pleadings, and both require that in fact a motion be made to so amend the pleadings, and no motion to amend the previously often-amended Complaint was made during the trial of this case. Thus, as this Court's Opinion in *Atlantic Coast Line v. Mims*, supra., clearly states, having failed to properly utilize the local rules of pleadings of the State of Florida, HOLLAND cannot be heard to now claim that he was denied a federal right and this Court should deny the Petition for Writ of Certiorari. See also *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308.

In short, HOLLAND has failed to properly raise and preserve the three questions presented to this Court; and even if the questions presented had been properly raised and preserved, there is a total absence of any showing of any conflict with the decision sought to be reviewed and any decision of this Court and in fact the decisions of this Court conclusively establish why the Petition for Writ of Certiorari should be denied.

3. The Trial Court Properly Charged Jury In This Case Under Federal Employers Liability Act.

The trial court correctly charged the jury in this case on not only the duties under the FELA, but also the duties owned by SCL under the Safety Appliance Act, Boiler Inspection Act and Power Brake Law. The total jury charge consumed 2,741 words and HOLLAND now complains of two words, i.e., "but for". HOLLAND is confusing the test of a jury case as set forth by this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957), and the test of liability once the case in fact goes to the jury. Since there can be no argument that federal decisions are controlling on the issue of the propriety of the jury instructions in FELA cases, the federal decisions which deal with the propriety of jury instructions are relevant here. The Court of Appeals, Third Circuit, accurately stated the rule in *Idzojtic v. Pennsylvania Railroad Co.*, 431 F.2d 1029 (3rd Cir., 1970), as follows:

> "However, the trial judge did not err in so refusing, (to instruct jury that railroad was liable if negligent in the slightest degree) since this court has stated that the 'Rogers case did not decide how a judge should instruct a jury in such cases.'. (citing cases) A trial judge complies with the Rogers test by submitting the case to the jury and not thereafter improperly restricting the jury in their findings either

as to employer negligence or whether it played any part in producing the injuries for which damages are sought." At 1034.

Holdings to that effect are *Ely v. Reading Co.*, 424 F.2d 758 (3rd Cir. 1970), and *Bertrand v. Southern Pacific Co.*, 282 F.2d 569 (9th Cir. 1960).

Rogers, supra., was an FELA case which resulted in a jury verdict in favor of the employee. The Supreme Court of Missouri reversed the jury's verdict on the grounds that the employee's evidence did not support the finding of employer liability. In reversing the Missouri Supreme Court, this Court held that a jury verdict in an FELA case should not be set aside if there were any facts submitted to the jury which could support their verdict. Thus, if there is any evidence of negligence, the case, under the rationale of *Rogers*, supra., must go to the jury; but the jury is certainly not required to find in favor of the employee. This is so because the Federal Employers Liability Act is not a workmen's compensation act, but permits recovery only after proving negligence by the greater weight of the evidence.

Perhaps one of the best discussions of the subject is found in *Funseth v. Great Northern Railway Co.*, 399 F.2d 918 (9th Cir. 1968), cert.den. 393 U.S. 1083. The Plaintiff in that case (having lost the trial) urged the trial court committed prejudicial error in giving the jury the following instruction:

"* * * the term 'proximate cause' means that cause which in a direct, unbroken sequence produces the injury complained of and without such injury would not have happened. * * *" (At page 919)

In finding no error with the trial court's charge, the Ninth Circuit's Opinion states (at 921 and 922):

"In Rogers vs. Missouri Pacific Railway Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.ed.2d 493 (1957), the Supreme Court was again dealing with an evidentiary situation in which the Missouri Supreme Court had reversed a jury award to Plaintiff in an F.E.L.A. case. The Supreme Court granted certiorari and reversed the State Supreme Court upon the ground that the evidence was sufficient to support the jury finding for Plaintiff, pointing out that under F.E.L.A. the test of a jury case is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the employee's injury, citing Coray v. Southern Pacific Co., supra.

In Bertrand v. Southern Pacific Co., 282 F.2d 569 (9th Cir. 1960), the F.E.L.A. case in which the Plaintiff appealed after an adverse jury verdict, one of the questions on appeal was whether the trial judge had erred in failing to give Plaintiff's requested jury instruction to

the effect that the language of Rogers, i.e., 'played any part, even in the slightest, in producing the injury', constituted a 'test of the liability of the railroad carrier.' *The court, affirming, very properly pointed out that Rogers, supra., was concerned, not with a 'test of liability', but only with a 'test of a jury case'* and held the proposed instructions faulty in that it bound the jury to find what it was entitled to find but was not required to find.

[1] Certainly, the statutory requirement that the injury must have *resulted from negligence* necessarily implies that the injury must have been *caused by the negligence.* The words 'caused' and 'result' are correlative terms, each implying the other. The word 'result' used as a verb, means 'to happen or issue as a consequence or effect of some cause'. The word 'cause' means 'that which produces an effect or result, that from which anything proceeds and without which it would not exist." (See Webster Unabridged Dictionary). (emphasis supplied)

In the instruction here in question the trial court, attempting to further explain the causation required by the statute, told the jury in part that the cause must be a proximate cause, i.e., a 'cause which in a direct, unbroken sequence produces the injury and *without which* the injury would not have occurred.' (emphasis supplied)

[2] The first question is whether Coray and Rogers rendered this instruction erroneous in an F.E.L.A. case. We do not think so.

Both Coray and Rogers recognize, as this instruction substantially states, that the negligence of the railroad must 'contribute' (Coray) at least in part to the injury and that the negligence must 'play a part' (Rogers) even though the very slightest in producing the injury.

The instruction in question merely adds that the cause of the injury must produce the injury in a 'direct unbroken sequence.' We see nothing erroneous in this. Certainly, if the sequence of events between the negligence on the one hand and the injury on the other is broken, then the claimed cause, i.e., the negligence, would not really be a cause at all — nor the injury a 'result' of it.

The instruction in question also adds that the cause must be one *'without which the injury would not have occurred.'* We see nothing erroneous in this. Certainly, if the claimed result, i.e., the injury, would have occurred in any event, even without the negligence of the railroad, then the injury would not really be the 'result' of the negligence, nor the negligence the cause of it." (emphasis supplied)

HOLLAND submits that *Rogers,* supra., stands for the proposition that proximate cause or legal cause has

no place in an FELA action. HOLLAND'S interpretation of *Rogers* is grossly misconstrued. In fact, it is interesting to note that the trial court in *Rogers*, supra., charging the jury, used the actual term "proximate cause" (see page 505, footnote 9).

Since the FELA statute, 45 U.S.C. §51 et seq., is a comparative negligence statute, then obviously for the employee to recover the alleged negligence of the employer does not have to be *the* proximate cause or legal cause, but it must be *a* proximate cause or legal cause which contributed to causing the Plaintiff's injury. As stated by Justice Rutledge in *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018 (1949) at page 194 and 195:

> "We hold further, in the light of the trial instructions and such evidence as appears in the record before us, that the jury was justified in finding (1) that Respondent breached the Boiler Inspection Act * * * and (2) that such a breach was *a proximate cause of Petitioner's injury.*" (emphasis supplied)

While it is submitted that Judge Smith's concurring Opinion in the District Court of Appeal of Florida, First District, correctly sets forth the causative relationship in an FELA case (P.A. 5-7), it is clear under the decision below as well as numerous other cases that when the entire charge to the jury is considered as a whole, there was no harmful error. *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir., 1975); 3 Devitt & Blackmar, Federal Jury Practice and Instruction, §94.13 (3rd ed. 1977).

While the trial court's entire charge to the jury is voluminous, the following is a typical example of the numerous times that the jury was informed by the court that they must find for the Plaintiff if Defendant's negligence contributed, in whole or in part, to the Plaintiff's injuries and damages:

> "Now, under the Federal Employers Liability Act, the Defendant railroad company is liable if the Defendant, its agents, servants, or employees, acting in the scope of their agency or employment, were negligent *and the negligence played any part, however small, in producing the injury for which damages are sought.*" (emphasis supplied)

Thus, not only does the language with which the jury was charged in this case paraphrase the language of the Federal Employers Liability Act itself, but it is clearly more favorable to HOLLAND than the applicable case decisions require. It is also abundantly clear that there is no conflict with any decisions of this court, and in fact the charge to the jury is entirely proper and consistent with the decisions of this court and other courts concerning legal causation in an FELA case.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HOWELL, HOWELL, LILES,
BRADDOCK & MILTON

Joseph P. Milton
901 Blackstone Building
Jacksonville, Florida 32202
904/632-2200
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, JOSEPH P. MILTON, a member of the Bar of the Supreme Court of the United States do hereby certify that three copies of the foregoing Brief of Respondent, SCL, have been served by mail by depositing the same in a United States mail box with first class postage, prepaid, this ____ day of March, 1979, duly addressed to the following: WALTER H. BECKHAM, JR., ESQUIRE, and JOEL D. EATON, ESQUIRE, of Podhurst, Orseck & Parks, P.A., 25 West Flagler Street, Miami, Florida 33130; SUSAN GOLDMAN, ESQUIRE, PH 1, Roberts Building, 28 West Flagler Street, Miami, Florida 33130; and LAWRENCE V. HASTINGS, ESQUIRE, of Hastings and Goldman, 300 71st Street, Suite 530, Miami Beach, Florida 33140, Attorneys for Petitioner.

JOSEPH P. MILTON
Counsel of Record for
Respondent, Seaboard Coast
Line Railroad Company

APPENDIX

APPENDIX

EXCERPT FROM PRE-TRIAL CONFERENCE

MR. MILTON: As to their amendment. Your Honor, to Count I or the one that says, "negligently instructing or directing the train crew to pick up cars on the pass track in a manner and method as was known by the Defendant to be hazardous when there was a safer alternative method of accomplishing the same objectives.

* * *

Primarily on this amendment, Your Honor, my objection is pretty much the vagueness and broadness of what they are trying to allege. I don't know if they are trying to say somebody negligently instructed the crew or the manner and method the crew did the job was known to be hazardous or what they are saying.

MR. HASTINGS: Your Honor, just to cut through so Your Honor is familiar factually — we are both quite familiar through depositions taken. So, to cut through to the facts he is referring to — we are, in our complaint, *talking about in this particular instance, there was on the head end of the train 13 cars carrying Firestone tires. Our contention is those 13 cars should not have been at the front but should have been in the back of the particular train.*

Had they been in the back, rather than in the front where they were, this accident couldn't have happened. We have taken depositions. Both sides are familiar with it. That is one of the causal factors bringing about this accident.

We also have further evidence that they are aware of it was complained about on the part of the employees saying this is an unsafe and undesirable way of doing it. *So, therefore, this is the gravaman of what we are going forward in, in stating that there was a reasonable alternative way, which there certainly was,* and which they knew about it because they certainly did and were told. That is how it fits in. It is not vague. It is well known to both of us what the testimony will be.

MR. FEHNER: What we tried to do, Your Honor, in drafting this amendment was to try to be as explicit as we could as to this particular act of negligence. I am sure it would be admissible as evidence. We felt in fairness to the Defendant we should set out this specifically as being one of our primary allegations here and one of the things we felt we could prove under the Federal Employers' Liability Act. That was the reason for putting it in. I think there is a good bit of evidence in almost all the depositions as to alternative methods. (Emphasis added).

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

BOBBY WADE HOLLAND,
Plaintiff,

versus

No. 74-11743-CA
Div. "D"

SEABOARD COAST LINE RAILROAD COMPANY, a railroad corporation,
Defendant.

MOTION FOR NEW TRIAL

Pursuant to the Florida Rules of Civil Procedure, Plaintiff BOBBY WADE HOLLAND, moves that the verdict of the jury entered in the above entitled action on December 12, 1975 be set aside and that Judgment entered on said verdict be vacated and set aside and that a new trial be granted to Plaintiff for the following reasons:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The verdict is contrary to the manifest weight of the evidence.

5. The Court erred in denying Plaintiff's motion for a directed verdict in Plaintiff's favor at the close of Defendant's case.

6. The Court erred in denying Plaintiff's motion for a directed verdict in Plaintiff's favor at the close of all of the evidence.

7. The Court erred in granting Defendant's objection to and in excluding evidence of weeds, tall grass, etc., south of the pass-track switch, such evidence being vital to the question of Defendant's negligence in failing to provide a reasonably safe place to work and/or a reasonably safe work method under the Federal Employers Liability Act. This negligence-evidence was offered by Plaintiff and excluded by this Court during the testimony of Huckaba, S. E. Davis, J. McCarty, M. Zadnichek and C. B. Thompson, among others, and was causally related to Plaintiff's accident by preventing Plaintiff from riding the engine instead of the last car back to join the train.

8. The Court erred in admitting, over Plaintiff's objection, evidence that the engineer, C. B. Thompson, was and/or is "a good engineer" and other evidence to the same effect, as such evidence of character, reputation, and/or lack of misconduct in prior train operations is totally irrelevant to his conduct in the accident involved in the case at bar and is inadmissible on the issues of negligence and law violation and was highly prejudicial to Plaintiff.

9. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 5 as follows:

> "Discrepancies in a witness' testimony, or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail shall be considered in weighing its significance. But a willful falsehood always is a matter of importance and should be seriously considered."

10. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 11A as follows:

> "Under the Federal Employers' Liability Act defendant Railroad Company is liable if defendant, its agents, servants, or employees, acting in the scope of their agency or employment were negligent however slight and the negligence played any part, however small, in producing the injury for which damages are sought."

11. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 12 as follows:

> "If you find there was a negligent act or omission by the Defendant Railroad and that the Railroad should have reasonably foreseen that such act or omission might cause injury to its employees, then the Plaintiff is entitled recovery for those injuries which he actually sustained without regard to whether the exact nature and extent of his injuries could have been foreseen by the Railroad."

12. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 13 as follows:

> "You are instructed that it is the duty of the master(railroad) to exercise reasonable care and caution to furnish its employee a reasonably safe place in which to work, reasonably safe appliances with which to work, and a reasonably safe method by which to work, and to use a reasonably adequate number of fellow servants for doing the work as may be required in the employment, and it is the duty of the master(railroad) to exercise reasonable care so as not to expose its employee to perils and dangers which may be guarded against by ordinary care and diligence."

13. The Court erred in refusing to give to the jury either Plaintiff's Requested Instruction No. 19 or Plaintiff's Requested Instruction No. 20 as follows:

> "(19) 'In any action brought against any common carrier under or by virtue of (this Act) * * * such employee shall not be held to assume that risk of his employment in any case where such injury * * * resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier * * *.' "

> "(20) 'If you find that the defendant failed to provide the plaintiff with a reasonably safe place to work, and that such failure was the cause of the injuries sustained by the plaintiff, then I charge you that whether or not the plaintiff knew of the unsafe nature of the place or of the dangers existing thereat, if any, is immaterial, and he would be entitled to a judgment against the defendant for his damages.

14. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 21 as follows:

> "Plaintiff has introduced into evidence Section 6 of a certain mediation agreement between plaintiff's union and defendant railroad among others. Whether or not these contract provisions establish a *higher* standard of care on the part of defendant railroad concerning insufficient radio frequencies with respect to the Railroad's negligence or lack thereof is a jury question for your determination. You may consider the plain meaning of the contract Section 6 in this regard."

15. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 23 as follows:

> "If you find that defendant railroad's engineer used the wrong brakes by applying the locomotive brakes rather than the automatic train brakes under the circumstances involved, and that the use of the locomotive brakes caused or contributed to cause unusual and violent slack action, then defendant is responsible for any injury resulting in whole or in part from such negligence, however small a part such negligence played in bringing about plaintiff's injuries.

16. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 24 as follows:

> "If you find that defendant railroad's engineer received a radio signal "3" which caused or contributed to cause said engineer to apply the locomotive brakes at a point when they would not ordinarily have been applied, and that such application caused or contributed to cause unusual and abnormal slack action which played any part, even the slightest, in bringing about plaintiff's injuries, then you must find for plaintiff on the issue of negligence."

17. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 30 as follows:

> "One portion of this case is brought by the Plaintiff under and pursuant to a Federal Safety Appliance Act commonly known as the Boiler Inspection Act. The Boiler Inspection Act provides in part that no railroad may use any locomotive unless the 'locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate' and 'have been inspected from time to time in accordance with' the Boiler Inspection Act.
>
> If you find from the preponderance of the evidence that defendant Railroad violated the Boiler Inspection Act and that the violation played any part, no matter how small, in causing or contributing to cause Plaintiff's injuries, then defendant's liability and responsibility has been established, and you must proceed to the question of damages to be awarded.
>
> You are further instructed that contributory negligence is not a defense in whole or in part to damages wholly or partly caused by a violation of the Boiler Inspection Act, so that you are not to reduce Plaintiff's damages in any amount on account of contributory negligence, if any, on Plaintiff's part."

17(a). The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 35 as follows:

"Another portion of this case is brought by the plaintiff under and pursuant to a part of the Federal Safety Appliance Acts commonly known as the Power Brake Law.

The Power Brake Law provides in part that the air brake system must be inspected according to the law and must be operative, with the air brake hoses coupled between all cars, during all train movements.

If you find from the preponderance of the evidence that the defendant violated the Power Brake Law and that the violation played any part, no matter how small, in causing or contributing to cause plaintiff's injuries, then defendant's liability and responsibility has been established and you must proceed to the question of damages to be awarded to the plaintiff.

You are further instructed that contributory negligence is not a defense in whole or in part to damages caused in whole or in part by a violation of the Power Brake Law and you are not to reduce plaintiff's damages in any amount if you find the violation caused plaintiff's injuries."

18. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 37 as follows:

"You are instructed that negligence (of a Defendant) may be proven by circumstantial

evidence as well as by parol or by word-of-mouth testimony, and I instruct you 'it is true that the evidence must show that the Defendant's negligence was . . . (a) cause of the accident but this may be proven as conclusively by circumstantial as by parol evidence.' 'Negligence may be established by direct or circumstantial evidence and may be inferred from either direct or circumstantial testimony when properly adduced or established' and it is for you as a jury to determine whether or not negligence can reasonably be established by such inferences from the circumstantial evidence of the case. Circumstantial evidence is *similarly permissible* as proof of violations of the Power Brake Law and Boiler Inspection Act."

19. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 39 as follows:

"Plaintiff is entitled to recover the reasonable value of attendant, nursing, and related services provided by his wife, as to both past and future such services reasonably required in view of plaintiff's injuries."

20. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 40 as follows:

"With respect to plaintiff's future loss of earning capacity, you may consider the

evidence presented concerning plaintiff's expected future wage increases based on (1) plaintiff's probable future promotions but for the accident involved, (2) relevant Union/Railroad contract provisions, and (3) productivity increases per man hour."

21. The Court erred in giving to the jury, over Plaintiff's objection, Defendant's Requested Instruction No. 9, as modified by the Court, as follows:

> "Negligence is a legal cause of injury if it directly and in natural and continuous sequence produces or contributes to producing such injury, so that it can reasonably be said that, but for the negligence, the injury would not have occurred. (Std. 5.1)"

22. The Court erred in giving to the jury, over Plaintiff's objection, Defendant's Requested Instruction No. 11, as modified by the Court, as follows:

> "You have been previously instructed that the Defendant had a duty to exercise reasonable care to provide the Plaintiff with a reasonably safe place to work. The phrase, 'reasonably safe place to work', is a phrase of relative application and does not mean the guarantee of absolute safety under every condition. The employer is required to use such care as the circumstances reasonably require."

23. The Court erred in giving to the jury, over Plaintiff's objection, Defendant's Requested Instruction No. 19, as modified by the Court, as follows:

> "The Court instructs the Jury that in the event you should award compensatory damages to the Plaintiff in this case, that any award will not be subject to Federal income taxes and that the Jury should not, therefore, add or subtract taxes in fixing the amount of any award."

24. The Court erred in giving to the jury, over Plaintiff's objection, Defendant's Requested Instruction No. 20, as follows (the Court's modification at the end is not known verbatim to Plaintiff but the instruction as given was also objected to):

> "An injured party is under a legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury, by resuming gainful employment as soon as such can reasonably be done. He may recover damages for lost earnings, but is precluded from recovery to the extent that he could have earned wages in the past and in the future."

25. The Court erred in excluding Professor Roberts' proffered testimony concerning Plaintiff's probably future wage increases based on probable promotions, Union/Railroad contract provisions, and productivity increases.

26. The Court erred in excluding Professor Roberts' proffered testimony concerning Plaintiff's probable future wage increases based on inflation.

27. It is apparent that the jury's verdict in this cause was the result of prejudice, passion or other improper sentiments or considerations and disassociated from the evidence and testimony in this cause; that the verdict was against the law and the evidence and the manifest weight of the evidence and that the jury clearly did not understand the law in this Court's charge to the jury and/or did not apply such law to the facts demonstrated by the evidence; and that the verdict is such as to shock the judicial conscience of this Court.

28. Plaintiff would suggest that the jury acted upon matters not in "evidence" and not within their common knowledge. Upon information and belief the jury communicated in writing with all counsel and the Court on the last day of trial before being charged by the Court as to the law, despite being instructed by this Court to have no communications with counsel for Plaintiff or Defendant.

WHEREFORE, Plaintiff, BOBBY WADE HOLLAND, respectfully submits that a New Trial should be granted to Plaintiff.

HASTINGS & GOLDMAN
Attorneys for Plaintiff
300 - 71 Street
Suite 530
Miami Beach, Florida, 33141
861-4971

Lawrence V. Hastings

I HEREBY CERTIFY that a true copy of the above Motion for New Trial was furnished to TOOLE, TAYLOR, MOSELEY & MILTON, Attorneys for Defendant, 1014 Barnett Bank Building, Jacksonville, Florida, 32202, this ____ day of December, 1975.

Lawrence V. Hastings

ISSUES PRESENTED

I

WHETHER THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF WEEDS, TALL GRASS, DEBRIS, ETC., SOUTH OF THE PASS TRACK SWITCH WHERE SUCH EVIDENCE WAS VITAL ON QUESTION OF SEABOARD'S NEGLIGENCE IN FAILING TO PROVIDE A REASONABLY SAFE PLACE TO WORK AND/OR REASONABLY SAFE WORK METHOD UNDER THE FEDERAL EMPLOYERS LIABILITY ACT — WHETHER THE TRIAL COURT IMPROPERLY DENIED HOLLAND'S MOTION FOR NEW TRIAL (Raised by Assignments of Error Nos. 1-3, 14, 35, 35 (a), 46, 69).

II

WHETHER THE TRIAL COURT ERRED IN ITS CHARGE TO THE JURY ON CAUSATION IN THIS FELA AND SAFETY APPLIANCE ACT CASE BY INCLUDING "BUT FOR" PROXIMATE CAUSE LANGUAGE THEREIN — WHETHER THE TRIAL COURT ERRED IN DENYING HOLLAND'S MOTION FOR NEW TRIAL (Raised by Assignments of Error Nos. 1-3, 17, 29, 36-38, 61, 69).

III

WHETHER THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTIONS TO INTERVIEW

JURORS, INCLUDING ALTERNATES AND IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL (Raised by Assignments of Error Nos. 1-11, 67-69).

IV

WHETHER THE TRIAL COURT ERRED IN DENYING HOLLAND'S MOTION FOR NEW TRIAL WHERE THE VERDICT FOR SEABOARD IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE (Raised by Assignments of Error Nos. 1-3, 13, 40-43, 69).

ISSUES INVOLVED ON JURISDICTION

The issues involved on jurisdiction are:

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS IN JURISDICTIONAL DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

A) ON ADMISSIBILITY OF PROOF CONCERNING AN ALTERNATIVE METHOD AND SITE WHICH WAS NOT USED BECAUSE OF RAILROAD FAULT IN AN FELA CASE, UNDER A COMPLAINT ALLEGING NEGLIGENCE IN FAILURE TO PROVIDE A REASONABLY SAFE PLACE TO WORK; AND IN DIRECTING

HAZARDOUS METHOD WHEN THERE WAS A SAFER, ALTERNATIVE METHOD;

B) ON EFFECT OF IMPROPER EXCLUSION OF SUCH EVIDENCE;

C) AND WHETHER DECISION IS IN JURISDICTIONAL DIRECT CONFLICT WITH PRIOR DECISION OF THIS COURT AND PRIOR DECISION OF THIRD DISTRICT HOLDING THAT IT IS HARMFUL ERROR TO INSTRUCT JURY ON "PROXIMATE CAUSE" CONCEPT IN FELA CASE.